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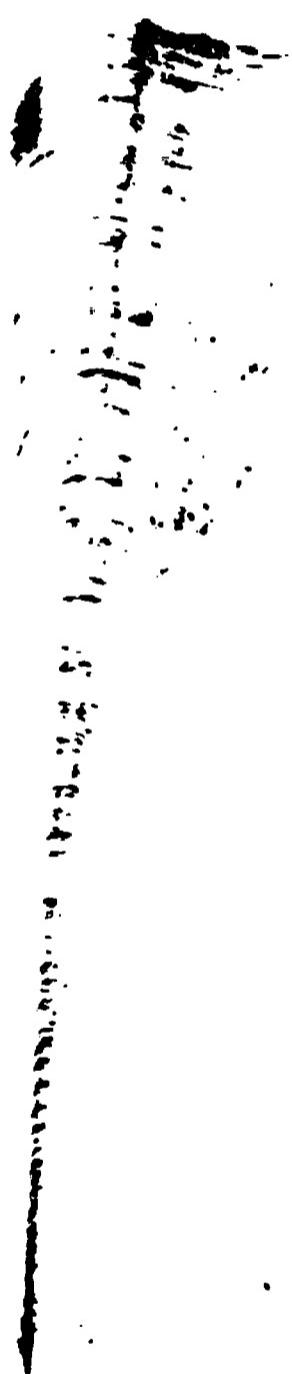
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REPORTS OF CAUSES

DETERMINED IN

The United States District Court

FOR THE

DISTRICT OF HAWAII.

Edited and Reported by

ELIZABETH H. RYAN,

Attorney at Law.

VOLUME I.

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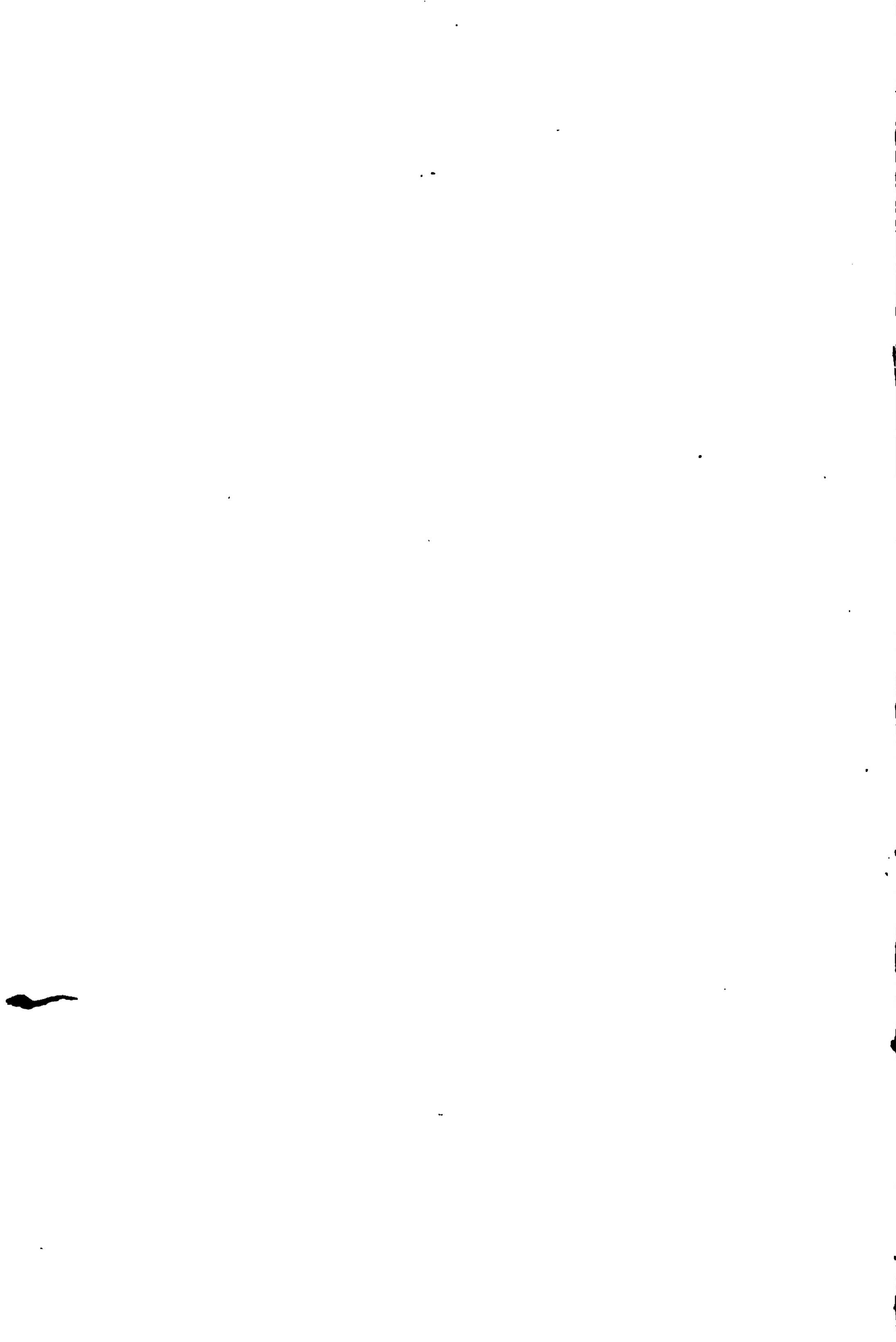
**ORGANIZATION OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF HAWAII.**

(Act of Congress of April 30th, 1900, Vol. 31, U. S. St. 141.)

Section 86. That there shall be established in said Territory (Hawaii) a District Court to consist of one judge, who shall reside therein and be called the District Judge. The President of the United States by and with the consent of the Senate of the United States, shall appoint a district judge, a district attorney, and a marshal of the United States for the said District, and said judge, attorney and marshal, shall hold office for six years unless sooner removed by the President. Said Court shall have in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizable in a Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court; and said judge, district attorney and marshal shall have and exercise in the Territory of Hawaii, all the powers conferred by the laws of the United States upon the judges, district attorneys and marshals of District and Circuit Courts of the United States.

Writs of error and appeals from said District Court shall be had and allowed to the Circuit Court of Appeals in the Ninth Judicial Circuit in the same manner as writs of error and appeals are allowed from Circuit Courts to Circuit Courts of Appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said District Court. The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the Courts of the United States and the Courts of the several States shall govern in such matters and proceedings as between the Courts of the United States and the Courts of the Territory of Hawaii.

Regular terms of said Court shall be held at Honolulu on the second Monday in April and October, and at Hilo on the last Wednesday in January of each year; and special terms may be held at such times and places in said District as the said judge may deem expedient. The said District Judge shall appoint a Clerk for said Court at a salary of three thousand dollars per annum; and shall appoint a reporter of said Court at a salary of twelve hundred dollars per annum.



OFFICERS
OF
The United States District Court
FOR THE
DISTRICT OF HAWAII.

MORRIS M. ESTEE, Presiding Judge.
ROBERT W. BRECKONS, U. S. District Attorney.
J. J. DUNNE, Assistant U. S. District Attorney.
EUGENE R. HENDRY, United States Marshal.
WALTER B. MALING, Clerk.
JAMES D. AVERY, Court Reporter.

REGULAR TERMS.—At Honolulu, on the Second Monday in April and October; at Hilo, on the last Wednesday in January of each year.

SPECIAL TERMS.—At such times and places in the District as the Judge may deem expedient.



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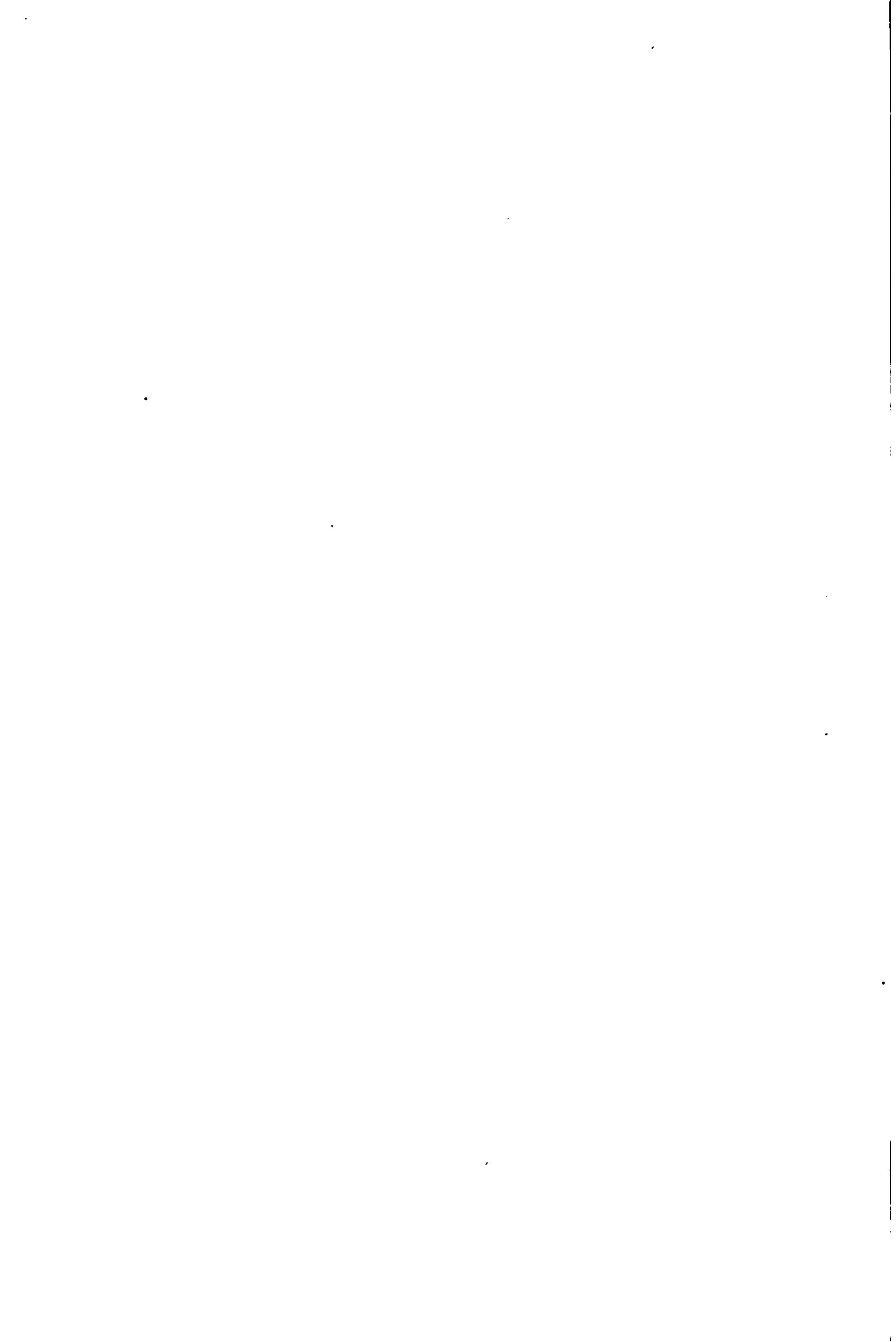


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CAUSES ARGUED AND DETERMINED

IN THE

United States District Court

FOR THE
District of Hawaii.

UNITED STATES OF AMERICA *v.* YONG HO.

DECIDED: AUGUST 19, 1900.

1. Chinese in the Hawaiian Islands on June 14, 1900, when the "Act to provide a government for the Territory of Hawaii" went into effect, were by Section 101 thereof, compelled to procure the certificate of residence required by the Act of Congress approved May 5, 1892, as amended by the Act of Congress approved November 3, 1893, entitled "An Act to amend an Act entitled 'An Act to prohibit the coming of Chinese persons into the United States, approved May 5, 1892,'" within one year from the said 14th day of June, 1900, or in default thereof be deemed to be unlawfully within the United States.
2. There is no provision in the Act of Congress of April 30, 1900, providing a government for the Territory of Hawaii, permitting the return to Hawaii of Chinese laborers who had voluntarily left the Hawaiian islands after annexation and before said Act went into effect, but with intent to return. Congress must be presumed to have known that there might be many such Chinese, and having made no provision for their return and registry after June 14, 1900, or the issuance of a certificate of residence to them, it is clear that they should be excluded.
3. Where a Chinese laborer left the Hawaiian Islands in October, 1899, after annexation, but before the Act for the government of the Territory went into effect, and did not return within the year mentioned in the certificate entitling him to return, but returned twenty-one months after his departure, and claimed admission under said certificate, *Held*, that he does not come within the provisions of Section 101 of the Act of April 30, 1900, as he was not "in the Hawaiian Islands" when the Act for the government of the Territory went into effect, and he is not entitled to come into the Territory to register as a Chinese laborer.

AUGUST, 1900.

CHINESE EXCLUSION LAWS. PROCEEDING TO DEPORT.

J. J. Dunne, Assistant U. S. District Attorney for the plaintiff.

T. McCants Stewart and *W. A. Whiting*, attorneys for defendant.

ESTEE, J. This is a proceeding heard before the Court, for the deportation of one Yong Ho, a Chinese laborer, arrested upon the information of W. R. Hendry, Deputy Marshal of the United States for the District of Hawaii, on the ground that said Yong Ho is a Chinese laborer and now within the limits of the United States and the District of Hawaii, without the certificate of residence required by the Act of Congress approved May 5th, 1892, and the Act of November 3rd, 1893, amendatory thereof, and the Act of Congress approved April 30th, 1900, providing a government for the Territory of Hawaii.

It is prescribed by the Act of Congress approved April 30th, 1900, and entitled an "Act to provide a government for the Territory of Hawaii," (Vol. 31, U. S. Stats., page 141), and especially by section 101 of said Act—

"That Chinese in the Hawaiian Islands when this Act takes effect, may within one year thereafter obtain certificates of residence as required by 'An Act to prohibit the coming of Chinese persons into the United States,' approved May fifth, eighteen hundred and ninety-two, as amended by an Act approved November third, eighteen hundred and ninety-three, entitled 'An Act to amend an Act entitled an 'Act to prohibit the coming of Chinese persons into the United States,' approved May fifth, eighteen hundred and ninety-two,' and until the expiration of said year shall not be deemed to be unlawfully in the United States if found therein without such certificates. * * *"

This Act took effect June 14th, 1900.

On the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of all others) it is clear that no Chinaman not in the Hawaiian Islands when the

foregoing Act went into effect was entitled to a certificate of residence.

Section 6 of the Act of Congress of May 5th, 1892, as amended by the Act of November 3rd, 1893, and which Acts are in terms made applicable to this Territory, prescribes that:—

“It shall be the duty of all Chinese laborers within the limits of the United States, who were entitled to remain in the United States before the passage of the Act to which this is an amendment, to apply to the Collector of Internal Revenue of their respective districts within six months after the passage of this Act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail or refuse to comply with the provisions of this Act, and the Act to which this is an amendment, or who, after the expiration of said six months shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States * * * Marshal or his deputies, and taken before a United States Judge, whose duty it shall be to order that he be deported from the United States * * * unless he shall prove to the satisfaction of said Judge that by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate and to the satisfaction of said United States Judge, and by at least one credible witness other than Chinese, that he was a resident of the United States on the 5th day of May, eighteen hundred and ninety-two” (the day said Act took effect.)

This being amended by the Act for the government of the Territory of Hawaii, the time was extended within which Chinese laborers resident in the Hawaiian Islands could procure said certificates of residence to one year from the 14th day of June, 1900.

It will be seen that Chinese who were “in the Hawaiian Islands” on the 14th day of June, 1900, were by law compelled to comply with the terms of Section 101 of the Act of April 30th, 1900, and in accordance with the provisions of Section 6

AUGUST, 1900.

of the Act of May 5th, 1892, as amended by the Act of November 3rd, 1893, obtain the certificate of residence within twelve months therefrom or be subject to deportation, unless they could clearly establish to the satisfaction of the Judge "that by reason of accident, sickness or other unavoidable cause" they were unable to secure the same; and at the same time establishing to the satisfaction of said Judge, and "by at least one credible witness other than Chinese," that they were residents of the Territory on the said 14th day of June, 1900, when the Act went into effect. What are the facts in this case?

The defendant left the Hawaiian Islands after annexation in October, 1899, and went to China, returning sometime in July, 1901, nearly two years thereafter, and so he was therefore not a resident of the Territory on the 14th day of June, 1900. His excuse for not returning within the year provided for in his certificate of return was that he had rheumatism and could not for that reason return sooner.

But the sickness shown was a reason given for the delay to return within the year required by his return certificate, not the sickness contemplated by Section 6 of the Act of November 3rd, 1893, as a reason for a delay in registering as a Chinese laborer within the limits of the United States at the time the Act went into effect.

The Courts have uniformly sustained the Chinese Exclusion Laws. Chinese exclusion is simply the exercise of exclusive national jurisdiction within the territory of this nation. As was said by Chief Justice Marshall, as far back as in the case of *The Schooner Exchange v. McFadden, et al.*, reported in 7th Cranch, U. S. 116.

"The jurisdiction of the nation within its own Territory is necessarily exclusive and absolute."

In the case of *Chae Chang Ping v. United States*, reported in 130 U. S. 581, the Supreme Court of the United States held that—

"A certificate issued to a Chinese laborer under the * * * Act of May 6th, 1882, * * * conferred upon him no

right to return to the United States of which he could not be deprived by a subsequent Act of Congress." The Act of June 14, 1900, is such subsequent Act.

To the same point also is the more recent case of *Fong Yue Sing v. United States*, found in 149 U. S., page 698, where the Court say:

"That Congress could during the absence of a Chinese laborer who had formerly been in the United States, and had departed therefrom with a return certificate, pass a law restraining said Chinese laborer from returning."

And that is practically what has been done in this case.

It is conceded that Yong Ho, the defendant, was not "one of the Chinese in the Hawaiian Islands" when the Act of Congress of April 30th, 1900, went into effect, to-wit: June 14th, 1900. That being so he could not register even if he had returned in time according to the language of the statute. The law does not permit him to come into the country to get a certificate that he is a resident laborer. There is no reservation in the Act of April 30th, 1900, permitting the return of Chinese laborers who had voluntarily left the Hawaiian Islands after annexation with the intent to return. Congress must be assumed to have known that there might be many such Chinese, but having made no provision for their return after June 14th, 1900, or the issuance of a residence certificate to them, it is clear they should be excluded.

Yong Ho comes squarely within this class, and being a Chinese laborer within the limits of the United States and the District of Hawaii, without the registration certificate required, he possesses no right to remain here. And while it may be that a hardship is seemingly worked in this case, yet the permission to come here accorded to Chinese laborers is simply a privilege, not a right, which Congress can withdraw by any subsequent legislation. The Courts have no power to modify or change this regulation. As was said in the case of *Li Sing v. United States*, 180 U. S. 486, 495,

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"We cannot yield by modifying or relaxing by judicial construction the severity of the statute under consideration."

Let the defendant be remanded to the custody of the Marshal with instructions to deport him to the country from whence he came.

IN THE MATTER OF THE APPLICATION OF LAU
SAM, for a writ of habeas corpus.

DECIDED: AUGUST 21, 1900.

1. A hearing will be had upon an application for a writ of habeas corpus by a Chinese held for deportation under a decision adverse to his landing rendered by the proper immigration officers, where the hearing is claimed upon the ground that petitioner is an American citizen by reason of his birth in the Hawaiian Islands, and entitled as such American citizen to return to the Islands after a temporary sojourn in China.
2. Evidence, consisting only of the hearsay testimony of Chinese persons, and there being no white witnesses, considered inadequate to satisfy the Court of the truth of the allegations of petitioner as to birth in the Hawaiian Islands.

CHINESE EXCLUSION LAW. HABEAS CORPUS.

F. M. Brooks and *F. J. Berry*, for petitioner.

John C. Baird, U. S. District Attorney, for respondent.

ESTEE, J. This is an application by one Lau Sam, a Chinese person, for a writ of Habeas Corpus.

The Writ was issued by this Court directed to one Joshua K. Brown, United States Immigration Officer for the Territory of Hawaii, as prayed for; the petition alleging that said petitioner was illegally restrained of his liberty by said Brown as such U. S. Immigration Officer. Upon the coming in of the return, which was made and verified by E. R. Stackable, the Collector of Customs of the Port of Honolulu, it appeared that the petitioner had been and was then in the custody of said E. R. Stackable as such Collector of Customs, the said Joshua K. Brown being simply his assistant.

Thereupon in open Court on motion of John C. Baird, United States District Attorney for the District of Hawaii, on behalf of said E. R. Stackable as such Collector of Customs, said Joshua K. Brown being then present in Court and consenting, and Messrs. F. M. Brooks and F. J. Berry, counsel for the petitioner being also present and consenting, and the petitioner having been produced and being then present, it was ordered that said E. R. Stackable, Collector of Customs as aforesaid, be substituted as respondent in said matter in the place and stead of said Joshua K. Brown.

In his sworn return to said writ, the said E. R. Stackable alleges the detention of the petitioner in his custody as a native and citizen of China and an alien and a laborer, the embarkment of the said petitioner as a steerage passenger at China, on the steam vessel "Coptic," his arrival at the port of Honolulu, Territory of Hawaii, and his attempt to enter said Territory.

That said E. R. Stackable as such Collector of Customs for the Port of Honolulu, examined the said petitioner as to his right to land in the Territory of the United States and become a resident thereof, and after inquiring into the same, held that said Lau Sam was an alien laborer and not entitled to land in the United States Territory or become a resident thereof; and further determined and ordered that said Lau Sam be deported and carried back to China to the port from whence he sailed at the expense of the steamship company which had conveyed him to the port of Honolulu.

That thereafter on August 1st, 1900, the said Lau Sam appealed in writing from such decision of the Collector of Customs, to the "Honorable Commissioner General of Immigration of the United States of America," which appeal is in the words and figures following:

"Honolulu, Territory of Hawaii, August 1, 1900.

"Mr. E. R. Stackable,

"Collector of Customs for the Port of Honolulu, Territory
of Hawaii, and Mr. Joshua K. Brown, U. S. Inspector
of Chinese.

AUGUST, 1900.

"Sirs:

"The undersigned, an Hawaiian born citizen, who arrived at the port of Honolulu, from China, on the 30th day of June, 1900, hereby appeals from the decision made by you and each of you refusing to allow him to land in the Territory of Hawaii, to the 'Honorable Commissioner General of Immigration of the United States of America.'

This appeal is taken on the ground that the undersigned having been born in the Hawaiian Islands, pursuant to permission given under the law of the United States of America, that Chinese persons born in the Hawaiian Islands or United States Territory, and being duly qualified and entitled to enter said Hawaiian Islands, after a temporary absence in China, he should not have been denied permission to land.

"Respectfully,

"LAU SAM.

"By his attorney,

"F. M. BROOKS."

That thereafter the ocean steamer "Coptic" upon which the said Lau Sam had arrived at the port of Honolulu, departed from said port, leaving the said Lau Sam in the custody of the said Collector of Customs pending his said appeal. That on the first day of August, 1900, the said Lau Sam withdrew his said appeal, the said withdrawal being in the words and figures following, to wit:

"Honolulu, August 1st, 1900.

"Mr. Brown.

"The friends of Lau Sam, No. 92 Coptic, Lau Yuen, No. 42 Coptic, ask that their appeal be withdrawn if it is not too late. They think that the time and expense will be too great.

"Yours, etc.,

"F. M. BROOKS,

"Attorney for Lau Sam, Lau Yuen.

"Received at 9:30 a. m., August 2, 1900, too late to get these people from quarantine station before sailing of S. S. Coptic, 10 a. m.

"JOSHUA K. BROWN,
"Chinese Inspector."

The return of said Collector of Customs further alleges the detention of the said Lau Sam under the Statutes of the United States in such cases made and provided, and alleges that the decision of the Collector is final and conclusive in the absence of an appeal to the Honorable Secretary of the Treasury of the United States.

Upon the hearing before the Court, the petitioner introduced testimony tending to show that he was one of the four sons of Lau Kam Choy, a Chinese merchant or planter formerly residing or doing business at Palama, a portion of the city of Honolulu, and of Yeong Shee, his wife. And it was claimed that the petitioner was born during the sixth year of the reign of the Chinese Emperor, Kwong Su, according to the Chinese method of computing time, which so far as can be gathered from the testimony, would be about the year 1880. That Lau Kam Choy, the father, with his family including the petitioner who was then about four years of age, left the Hawaiian Islands for China, where he has since continuously resided, a period of between sixteen and seventeen years.

Four Chinese witnesses testified that petitioner was the son of Lau Kam Choy, born at Palama. One of these witnesses, Lau Duck, who claims to be the uncle of petitioner, testified that the petitioner is the same person, known as Lau Sam, who was the son of Lau Kam Choy, and who was born at Palama over twenty years ago, and who left these Islands in company with his father and other members of the family, over sixteen years ago. Lau Duck, the uncle, was not present in these Islands at the time of the birth of Lau Sam, and had not seen him from the time he left here over sixteen years ago, until about four years ago, when he, Lau Duck, went back to China, where he claims to have seen the petitioner and been

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introduced to him as Lau Sam. Lau Duck testified that he remained in China about two years and saw the petitioner frequently during that time, and then returned to the Islands of Hawaii about two years ago. He next saw the petitioner shortly after he arrived at Honolulu, a few weeks ago. He testified that he knew Lau Sam was coming back to these Islands because Lau Kam Choy, the father of Lau Sam, had written to him advising him that he was about to sail for Honolulu and requested him to get a permit for him to land.

The petitioner, Lau Sam, remembers nothing of his residence on the Islands, and testified that he knew he was born here because his father had told him so; and the other witnesses, one of whom had been associated with his father in business, testified that the petitioner Lau Sam was born here; that they knew this because Lau Duck, the uncle, had told them so. All the material facts are sustained only by Chinese and mainly hearsay, testimony. There are no white witnesses to establish any of the alleged facts.

To my mind the evidence is wholly insufficient to establish the identity of the petitioner with the Lau Sam claimed to have been born here some twenty years ago as the child of Lau Kam Choy and Yeong Shee, his wife, or that Lau Sam was born here. Similar questions involved in this inquiry have been considered by other United States Courts. For instance, the facts in the case of *In re Louie You* decided by the United States District Court for the District of Oregon, on the 14th of September, 1899, and reported in 97 Fed. Rep. 580, are very similar to those involved here. In that case the court said:

"The petitioner claims that he went away with his father sixteen years ago, when he was three years of age. Three Chinese witnesses testified that he was the son of Louie Park, born here. One of these is his brother, another is his father's former partner, and a third is the Chinese doctor who claims to have been present at the birth of the petitioner. It may be that the petitioner is the son of Louie Park. I have no means of satisfying myself that he is what he claims to be, unless I accept unreservedly the uncorroborated testimony of these Chinese

witnesses, and this I am not willing to do. I am not willing to establish the precedent of admitting Chinese persons, who have admittedly remained out of the country for so great a length of time, unless some white witness, or some fact not depending upon Chinese testimony corroborates the testimony of the Chinese witnesses relied upon to establish the identity of the person who seeks a landing. Those who leave the country when infants, must not expect to gain ready readmission after they have in effect reached maturity. If satisfactory proof of their right to land is not possible in such a case, the fault is theirs. The difficulty is one easily foreseen."

See also, *Lee Sing Far v. U. S.*, 94 Fed. Rep. 834, and cases there cited.

Gee Fook Sing v. U. S., 49 Fed. Rep. 146.

As was said by the Supreme Court of the United States in the case of *Quock Ting v. U. S.*, 140 U. S. 417, 420:

"Undoubtedly as a general rule, positive testimony as to a particular fact uncontradicted by any one, should control the decision of the Court, but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions of his own conduct as to discredit his whole story. His manner too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there is no adverse verbal testimony adduced."

In the case at bar, I am convinced, after a careful consideration of all the testimony adduced, that the statements of the petitioner and the witnesses produced in his behalf, are so highly improbable that their testimony is unworthy of belief, and I hereby remand the petitioner.

AUGUST, 1900.

EUGENE AVERY v. WILLIAM C. KING.

DECIDED: AUGUST 31, 1900.

1. A citizen of a State cannot sue a citizen of a Territory in the Courts of the United States where diverse citizenship is the only ground of jurisdiction relied upon.
2. A demurrer to the jurisdiction sustained and the action dismissed where it appeared upon the face of the complaint that the only ground for bringing an action for damages in the Federal Court were the facts that the plaintiff was "a citizen of the United States of America, and that his permanent place of abode is in the city and county of San Francisco, State of California," and that the defendant is a citizen of the Territory of Hawaii.

ACTION FOR DAMAGES. DEMURRER TO THE JURISDICTION.

Davis & Gear for plaintiff.*Kinney, Ballou & McClanahan* for defendant.

ESTEE, J. This is an action in tort brought by the plaintiff against the defendant, and basing his right to bring the action in this Court upon the following allegations of jurisdiction:—

"The undersigned plaintiff, Eugene Avery, complains of William C. King, who resides in Honolulu, in the Island of Oahu, and within the jurisdiction of the Court, and claims the sum of five thousand dollars for damages resulting to him by reason of the trespasses hereinafter in this complaint alleged and set out.

"And the said plaintiff alleges that he is a citizen of the United States of America, and that his permanent place of abode is in the City and County of San Francisco, State of California, United States of America.

"And the said defendant, W. C. King is a citizen of the Territory of Hawaii, and resides at Honolulu in the said Territory and within the jurisdiction of this Court."

The defendant demurred to the plaintiff's declaration on two grounds, only one of which the Court considers it necessary to pass upon, to wit:—

"That the said declaration does not state facts sufficient to give this Court jurisdiction of said cause, but on the contrary it appears on the face of the said declaration that this Court has no jurisdiction herein."

The single question to be considered is,—can a citizen of a State sue a citizen of a Territory of the United States, in the Federal Court, diverse citizenship being the only ground of jurisdiction relied upon?

The Act of Congress of the United States determining the jurisdiction of Circuit Courts of the United States as amended August 13th, 1888, fixes that jurisdiction as follows:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars * * * or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy *between citizens of different States* * * * or a controversy between *citizens of a State and foreign States, citizens or subjects* * * *"

United States Statutes at Large, vol. 25, page 434.

It appears affirmatively from the declaration of plaintiff, that the defendant is a citizen of the Territory of Hawaii; and that the plaintiff is a citizen of the United States of America, and that his permanent place of abode is in the City and County of San Francisco, State of California.

Assuming that the plaintiff intended to allege that he is a citizen of California because he alleges that "his permanent place of abode is in the City and County of San Francisco, State of California," yet he does not show thereby that he is a citizen of one State and the defendant a citizen of a different or foreign State.

Does that fact fail to bring the action within the jurisdiction of this Court? In the opinion of the Court it does. That has been the rule adopted since the earliest organization of the

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Federal Courts of the United States. One of the leading opinions rendered by the Supreme Court of the United States on this subject and under substantially the same statute, was that written by Mr. Chief Justice Marshall in the case of *New Orleans v. Winter, et al.*, 1 Wheaton, (U. S.) p. 89, (Brightley's notes), wherein it was held "that where the plaintiff is a citizen of a Territory and the defendant of a State, the Courts of the United States are not thereby enabled to take jurisdiction."

The converse of this must necessarily be the law, namely, that the citizen of a State cannot for like reasons sue a citizen of a Territory in a Federal Court.

The Court saying further in *New Orleans v. Winter, et al.*, (*supra*) "That it had been attempted to distinguish a Territory from the District of Columbia, but the Court is of opinion that the distinction cannot be maintained. They may differ in many respects, but neither of them is a State in the sense in which that term is used in the Constitution." Referring to the case of *Hepburn, et al., v. Ellzey*, 2 Cranch. 445, Brightley's notes.

See also—*Barney v. Baltimore City*, 6 Wall. (U. S.) 280; *Hooe v. Jamieson*, 166 U. S., p. 395; *Snead v. Sellers, et al.*, 66 Fed. Rep. 371; *Mansfield Coldwater and Lake Michigan Co., et al., v. Swan, et al.*, 111 U. S. 379.

There seems to be an unbroken line of decisions sustaining this position. A Territory of the United States is neither a foreign State nor a different State of the Union, nor a State of any character. Each State is an independent political organization. Each Territory is a dependent political organization and does not possess an attribute of State sovereignty. Congress is the representative of the people of the States, not the people of the Territories, and Congress controls the Territories. The Territory of Hawaii, therefore, is not a State within the meaning of the Constitution and laws of the United States, and this Court has no jurisdiction to determine the merits of this action.

It has been held by the Supreme Court of the United States, that—"if it does not appear at the outset that the suit is one of

which the Circuit Court at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed." (*Third Street and Suburban Railway Co. v. Lewis*, 173 U. S. 457.)

It is therefore ordered that the demurrer of defendant be sustained, and that the action be dismissed without prejudice.

IN THE MATTER OF THE APPLICATION OF AH SING, for a writ of *habeas corpus*.

DECIDED: SEPTEMBER 19, 1900.

1. A Chinaman already domiciled in the United States and shipping on board an American vessel as a seaman in an American port, and arriving at an American port on board such vessel, in the usual course of commerce on the sea from such American port, is not a Chinese immigrant under the Chinese Exclusion laws.
2. There is no provision in the Act of Congress, approved April 30th, 1900, entitled an "Act to provide a government for the Territory of Hawaii," authorizing the Collector of Customs at Honolulu to prohibit from landing at the port of Honolulu, a Chinese seaman arriving on board an American vessel sailing from an American port, New York, to said port of Honolulu.

CHINESE EXCLUSION LAW. APPLICATION FOR WRIT OF HABEAS CORPUS.

Davis & Gear, attorneys for petitioner.

John C. Baird, U. S. District Attorney for Edward P. Stackable, Collector of the Customs of the Port of Honolulu.

ESTEE, J. This is an application for a writ of *habeas corpus* made on behalf of one Ah Sing, a Chinaman, a seafaring man, a cook on board the American ship "Challenger" which sailed from the port of New York in the United States on the 14th day of April, 1900, and arrived at Honolulu on September 1st, 1900; the said petitioner claiming to be unlawfully detained and imprisoned by the Collector of Customs of the port of Honolulu, he having been refused a landing at said port by the

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Collector of Customs on the ground that he is an alien and a native of China, and not entitled to land under the Chinese Exclusion Acts.

Upon the hearing it was shown that the American ship "Challenger" sailed from the port of New York on the 14th day of April, 1900, for the port of Honolulu, Hawaiian Islands, and (as shown in the Articles of Shipping) to "such other ports and places in any part of the world as the Master may direct and back to a final port of discharge in the United States. * *"

That Ah Sing, the petitioner, was regularly shipped as cook on board the said ship "Challenger" at the said port of New York, signing the Shipping Articles in Chinese, the Shipping Commissioner placing opposite his Chinese signature, the words Ah Low in English; this being explained by the fact that the petitioner could not read English and did not know that the Commissioner had written his name Ah Low instead of Ah Sing as appears from the testimony of the Master of the ship and the petitioner.

Upon the arrival of the ship at the port of Honolulu, the Master of the vessel discharged her cargo and undertook to pay off the petitioner and discharge him at the port of Honolulu in accordance with the Shipping Articles; but the Collector of the Customs refused to allow petitioner to land.

It was also shown by the evidence at the hearing that the petitioner had been a seafaring man on American ships sailing out of the port of New York, for twenty years. He produced in evidence eight certificates of discharge from different American vessels on which he had sailed. The Master of the ship "Challenger" testified that the petitioner was a sailor; that the petitioner had consulted with him, the Master, about returning to New York; and that he believed the intention of the petitioner was to immediately re-ship upon another vessel as cook or steward to return to that port, and that it was not the intention of the petitioner to remain at the port of Honolulu.

The single question is, do the Chinese Exclusion Acts apply to this petitioner?

Several cases of a similar nature have come before other Courts, some of which we venture to refer to.

It was held in the recent case of the *United States v. Burke*, 99 Fed. Rep. 895, 896, that—

“The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons who come here with the intent to enter into and become a part of the mass of its population. * * *”

In the same case the Court further says after a review of all the statutes:

“That these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports * * * that alien seamen using the ports of the country in their ships are not alien immigrants * * *”

So in the case of *Chinese Cabin Waiter*, 7 Sawyer 536 (13 Fed. Rep. 286) where Ah Sing, a Chinaman, shipped on the “City of Sydney” and went to Australia, touching at various foreign ports without the certificate required to be obtained by every Chinese laborer, “who shall depart from the United States,” Mr. Justice Field held that the petitioner was not within the provision of the Act requiring a certificate as he was all the while upon an American vessel upon which he shipped in the United States for the round voyage to Australia, and return to an American port where he was to be discharged.

It was held in the case of *In re Jack Sen, et al.*, 13 Sawyer, 510, by Judge Sawyer of the 9th Circuit, that—

“A Chinese laborer who ships on an American vessel at an American port, for a round voyage and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States within the meaning of the exclusion Act of October 1, 1888.”

So it was held also in the recent case of *In re Jam*, 101 Fed. Rep., page 989, that—

“The treaty of 1894 with the empire of China, and Acts of Congress of 1888, 1894, excluding ‘Chinese laborers’ from

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coming into the United States, are not applicable to a Chinese seaman who ships as steward aboard a vessel bound for a port in the United States, and who lands with the intention and desire to re-ship as soon as possible."

So also in the very recent case of *In re Lew Young, et al.*, decided in the U. S. Circuit Court for the State of Washington, and not yet reported, where Judge Hanford held that—

"As sea-faring men, the petitioners are not 'Chinese laborers' under the meaning of the Exclusion Acts and they are entitled to their liberty."

In a word, the question presented in this case is not whether this Chinaman is now seeking to illegally enter into the United States at this port as an immigrant, for he is admitted not to be an immigrant as defined by the Exclusion Acts, but rather whether he, as a Chinese seaman, already domiciled in the United States, can legally follow the sea for a livelihood, when he sails on an American ship to an American port and in such port leave the ship with the intent to re-ship for the port of departure. I think he can do this and not violate the terms of the Exclusion Acts.

This Chinaman is not an immigrant under the law, nor is there any provision of the Organic Act for the government of the Territory of Hawaii, approved April 30th, 1900, authorizing the Collector of Customs to prohibit persons in a like position with this petitioner from landing from an American ship, coming in the usual course of commerce on the sea from an American port, New York to the port of Honolulu, which is also an American port.

The Court is of the opinion that the Chinese Exclusion Acts do not apply in this case and that the petitioner is entitled to land.

Let him be discharged from custody.

JOHN D. SPRECKELS & BROTHERS COMPANY *v.* THE
SHIP "DUNREGGAN," J. E. MACAULEY, Inter-
venor.

DECIDED: OCTOBER 11TH, 1900.

1. A steel sailing ship having a registered tonnage of 1447 tons net, found by the Court to be of the value of \$65,000 before being damaged, and having a valuable cargo, went ashore upon a coral reef encircling Diamond Head about six miles from the port of Honolulu, on the 8th day of August, 1900, at about 9:40 a. m., and remained on said reef until 4:10 p. m. of the 9th day of August, 1900, when, through the combined efforts of the steam tugs Fearless and Eleu and the United States Government cutter Iroquois, she was pulled off the reef, after sustaining damages rendering necessary repairs estimated to cost \$25,000, and a loss of cargo jettisoned, of the value of \$1,259.40. \$12,000 salvage awarded for the services of the three vessels in saving the ship valued at \$40,000 after cost of repairs and on \$54,366.59 value of cargo and freight saved.
2. Where valuable services were rendered by a United States Government cutter the Iroquois, in conjunction with two steam tugs, in rescuing a steel sailing vessel of 1447 tons net, together with her cargo, from a position of great peril on a coral reef, and an award of \$12,000 in full of all salvage in the case is decreed the salvors.

Held, that the said Government cutter Iroquois would have been entitled to \$3,000 of the said award, had it made any claim for salvage services, but not having done so, said \$3,000 inured to the salved vessel and her cargo.

3. Where it was shown that one of the salving tugs, the Eleu, had rendered services to the wrecked vessel on the 8th of August, while in command of her regular Captain (Hilibus), he agreeing that the same would be charged for at towage rates, but that the spring of the Eleu broke on that day, and she left for Honolulu; and where it was further shown that on the next afternoon, the 9th of August, the Eleu was detailed by the Harbor Master to take out a ship which was going to sea, and owing to the illness of her regular Captain, Captain Macauley was placed in command, and after towing out the ship, went over to the Dunreggan, and being asked by the Captain of the Dunreggan if the Eleu was the same boat that he had made the agreement with the day before, answered "yes," whereupon the Captain of the Dunreggan said, "Give us your hawser, then," which the Eleu proceeded to

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do, and worked for some three-quarters of an hour in conjunction with the Fearless and the Iroquois, when the Dunreggan came off the reef; and where it appeared that the Eleu made no demand for salvage services, but settled with the Dunreggan upon a towage basis of \$157.70 for the services rendered, and Captain Macauley intervened and claimed an award for his individual efforts in the matter, and where it was claimed by the Captain of the Dunreggan that he had an agreement with Macauley to work upon towage rates;

Held, that it is not clear that the Captain of the Dunreggan and Macauley understood each other, or that there was any meeting of minds between them on the 9th day of August in the nature of an agreement; that Captain Macauley was a volunteer when his services were accepted by the Captain of the Dunreggan, and that simply responding "yes" when asked if it was the same boat that the Captain of the Dunreggan had made the agreement with the day before, was not a confirmation of that agreement; that Captain Macauley under the circumstances of this case was entitled to some compensation for the salvage services rendered by him personally as Master of the Eleu, notwithstanding the settlement of the Eleu.

4. Where the evidence showed that upon an examination made by a diver after the Dunreggan was taken off the reef and brought into Honolulu, that "eight of her frames were injured and bent entirely away from the plates....the bottom of the ship was bent inand those frames were bent sidewise, the keel forward was slightly to the port side, the rivets in the plates were all spit out and the rudder injured," and that she was entirely unfit to go to sea without extensive repairs; and where it appeared that while the vessel was on the reef there was no immediate danger to life unless a storm had arisen, in which event the testimony bears out the presumption that the ship would have been pressed back upon the reef; and even without the possibility of a storm, the testimony showed that the ship was in hourly danger of swinging round broadside upon the reef and thereby becoming a perfect wreck;

Held, that for the saving of life there is no salvage, and that it was not necessary in order to entitle libellant to salvage that some one should lose his life or be in imminent peril of doing so; that if the salvors did all they could to save the ship, and at the same time avoid the danger which a loss of the ship would cause to the men on board, they were entitled to fair and liberal compensation in the event of success.

5. In determining the award to salvors, each case depends largely on its own merits; but it is clear in determining the award, several elements are to be considered; among them are the enterprise and risk of the salvors and value of the property risked; the time occupied in the rescue of the wrecked vessel; the danger

- and distress from which the property is rescued; the success of the efforts of the salvors and the value of the property saved.
6. No subsequent opinions of the officers of a wrecked vessel, looking backward as to what they might possibly have done to save the vessel, but which they did not do, can in anywise disparage or undervalue what was done by the salvors.

IN ADMIRALTY. CLAIM FOR SALVAGE SERVICES.

F. M. Hatch, Proctor for libellant; *W. Austin Whiting and Holmes & Stanley*, Proctors for respondent; *Paul Neumann*, Proctor for intervenor.

ESTEE, J. This is a libel for salvage in the sum of \$20,000 on the part of J. D. Spreckels Brothers & Co., the owners of the tug "Fearless" and for the Master and crew thereof, J. E. Macauley intervening with a claim of \$2500. The case was submitted to W. J. Robinson, Esq., as special referee for the taking of testimony. Eight hundred and seventy-one type-written pages of testimony were taken by said referee and the facts of the case as disclosed by this evidence seem to be these:

The "Dunreggan," a steel sailing vessel, bark rigged and having a registered tonnage of 1477 tons net, with one G. M. Dixon as Master, sailed from the port of London, Great Britain, on the 14th day of March, 1900, bound for the ports of Honolulu, Hawaiian Islands, and Seattle, Washington, with a cargo of general merchandise for both said ports. Said bark arrived off Diamond Head about six miles from Honolulu on the 8th of August, 1900, and went ashore upon the coral reef encircling Diamond Head at or about 9:40 a. m. of that day.

At about 11 o'clock a. m. of the same day, the tug "Fearless" owned by the libellant herein, Captain Brokaw in command, came out to the ship and after some parleying with the captain as to compensation to be paid him for services to be rendered, fastened a line to the "Dunreggan" and began tugging at the ship to pull her off the reef.

Later in the day, to-wit: about 2 p. m., the "Eleu" came out to the ship, she having been there earlier in the day, and again offered assistance; whereupon in the words of Captain Dixon

of the stranded "Dunreggan," the following conversation ensued:

"I asked him why he didn't strike a bargain with me this morning when he said it was a harbor government tug and that he must not make any bargain. He said that 'all he could charge me was whatever the tariff would be in this port; that was all he could charge me; the tariff in this port for her services. Towage tariff, all that could be charged for her services.' I agreed to that, and I said 'give us your hawser on those terms,' and it was on those terms I accepted."

After agreeing to accept the services of the "Eleu," that tug also fastened to the "Dunreggan" and began pulling in connection with the "Fearless" until about 6 p. m. when her spring broke, she slipped her hawser and left for Honolulu.

The United States Revenue Cutter "Iroquois," also came out with offers of assistance on the 8th of August, but did not succeed in getting a line on the "Dunreggan" on that day. The tug "Fearless" remained by the ship pulling all of the 8th of August, and also the entire night of the 8th, keeping her head to the wind; and continued doing so until 4:10 p. m. of the 9th of August at high tide, when the "Dunreggan" finally came off the reef and was towed into the harbor of Honolulu by the "Fearless." It seems that that tug worked continuously at the vessel save for an interval of about three-quarters of an hour on the 9th when her hawser broke, from the time she first went out to the ship until the "Dunreggan" finally yielded to the combined efforts of the tugs "Fearless" and "Eleu" and the U. S. Revenue Cutter "Iroquois" on the afternoon of the 9th.

The "Iroquois" came out on the 9th of August at about the hour of 2 p. m. and got a line on the "Dunreggan" and acted with the "Fearless" in striving to pull her off, until she finally came off. It also appears that the "Eleu" put in an appearance on the afternoon of the 9th of August about three or three thirty p. m. Captain Macauley, the interventor herein, was then acting as Master of the tug. The "Eleu" was detailed by Mr. Fuller, the Harbor Master of Honolulu, to take out the

ship "Dirigo" which was going to sea, and owing to the illness of her regular captain, Macauley was placed in command. After Captain Macauley had towed out the "Dirigo," he went over to the "Dunreggan." He reached her between two and three o'clock p. m. of the 9th, and when the "Eleu" came alongside of the "Dunreggan," in the words of Captain Dixon of the stranded vessel, substantiated by the testimony of Captain Macauley, before he accepted her hawser, the following conversation took place:

"I wanted to know (said Captain Dixon) whether it was the same boat that I had made the agreement with yesterday (the day before.) He said 'yes.' I said 'all right, give us your hawser then.' That was about a quarter past three or twenty minutes past three p. m. * * "

That upon the acceptance of the tender of the captain of the "Eleu," she fastened her hawser to the "Dunreggan" and forty-five minutes after doing so, all three vessels pulling together, the ship, having in the meanwhile been jettisoned of some eighty tons of cargo, came off the reef at high tide and was towed into Honolulu by the "Fearless" with all her cargo safe on board with the exception of the 80 tons jettisoned.

It is admitted that the value of the cargo and freight of the "Dunreggan" was \$54,266.59. This does not include the jettisoned cargo which was valued at about \$1259.40. There is some conflict of testimony as to what the ship was worth when she went upon the reef; the estimated value ranging from sixty to seventy-five thousand dollars. It is admitted, however, that she was insured for \$55,000 which is a most unusual insurance on a ship worth as claimed by some of the witnesses but \$60,000.

It is also admitted that the "Fearless" had a capacity of 812 horse power, and was valued at \$75,000; the "Iroquois," a capacity of 1100 horse power and that of the "Eleu," was only from 350 to 400 horse power.

The United States Revenue Cutter "Iroquois," makes no claim for salvage. Captain Pond, her commander, testifying

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that "it is not customary for naval vessels to charge for the rendition of such services."

The tug "Eleu" presented the following bill to the agents of the "Dunreggan" in Honolulu, which bill was paid in full, to-wit:

"Bill for services rendered the British bark Dunreggan on August 8th and 9th, 1900.

"August 8th, 1900, while on reef.....\$78.85

"To towing August 9th, assisting off the reef..... 78.85

"Total\$157.70

"Received payment,

"A. FULLER.

"O. K., G. H. DIXON. Honolulu, August, 1900."

(The A. Fuller referred to was the Harbor Master of Honolulu.) The tug "Eleu" is therefore not entitled to any further compensation.

Captain Macauley, acting master of the "Eleu" on the 9th of August, 1900, makes a personal demand for salvage services rendered by him on the said 9th day of August in the sum of \$2500.

The libellants demand salvage in the sum of \$20,000 for the services rendered by the tug "Fearless," as well for the master and crew of the tug as for the libellant named.

There was some evidence introduced upon the question of an agreement made between the master of the "Dunreggan" and Captain Brokaw of the "Fearless" as to the award of salvage to the "Fearless" being decided by arbitration in the event the "Fearless" should render services to the "Dunreggan" and succeed in getting her off the reef.

The testimony seems to be conflicting upon this point. That there was some sort of an oral agreement to arbitrate made between the two men there can be no doubt. Captain Brokaw demanded \$20,000 for pulling the ship off the reef, to which Captain Dixon demurred; but finally consented that Captain Brokaw should fasten a line to his ship and help him out of his

dangerous position, on condition that if he were not successful he should have nothing; and if he were, it should be submitted to arbitration. To this Captain Brokaw assented, and immediately fastened his line to the ship. No definite agreement was made as to the arbitration, either then or since then, either as to who were to be the arbitrators, whether there was to be an order of Court made in relation thereto or in what way it was to be conducted. The whole arbitration agreement, if it may be termed such, was inchoate. But conceding that there had been an agreement to arbitrate which had failed through the fault of either party, that would not have prevented this Court from taking jurisdiction of an action for salvage in the matter in the absence of any agreement for a fixed sum to be paid at all events. *Coffin v. The John Shaw*, 1 Cliff. (U. S.) 230; *The Kimberley*, 40 Fed. 289; *The Excelsior*, 123 U. S. 40.

It is admitted by all the parties to the action that the "Dunreggan" was in a position of great danger; that the "Fearless" rendered efficient services in rescuing her and her cargo; but as to the services rendered by Captain Macauley while in command of the "Eleu" on the 9th, there is considerable dispute. In this case the matter resolves itself into the two questions of who is entitled to the salvage award and what amount or amounts should be allowed to each party.

The authorities differ greatly on the question of the amount of salvage to be awarded. Each case depends largely on its own circumstances. For that reason it is not easy to obtain much assistance from adjudicated cases; but it is clear that in determining the reward of the salvors, several elements are to be considered. Among them are the enterprise and risk of the salvors, and value of the property risked, the time occupied in the rescue of the wrecked vessel; the danger and distress from which the property is rescued; the success of the efforts of the salvors and the value of the property saved.

A reasonable reward should be allowed to the salvors in all cases where a ship is subject to salvage and where the salvors risk their lives or property and the circumstances show bold and

fearless effort on the part of the salvors. In this case, the ship and cargo saved were in great danger of total loss. Captain Pond of the "Iroquois", said in reference to the position and danger of the tug "Fearless" while hauling at the "Dunreggan", "that it was not a place where he would ordinarily care to take his vessel, unless in a case of absolute necessity"; yet the "Fearless" was fortunate enough to avoid any untoward accident in her efforts to rescue the stranded vessel. The officers and men of the "Fearless" did their full duty in the premises, and while there were no peculiarly hazardous circumstances connected with what they did, and especially in view of the fact that no lives were lost or serious injury suffered, yet it is not debatable but what there was some risk and more or less bravery displayed by the officers and men of the "Fearless" in remaining all of the night of the 8th of August in shallow waters on the edge of the coral reef (the cause of the disaster of the "Dunreggan") within a hundred yards of the breakers, subject to strong currents, hauling and pulling at the "Dunreggan" in the darkness of the night in order to keep her head to the sea and to the wind. That this largely prevented the stranded vessel from going broadside upon the reef and thus becoming a total wreck, is borne out by the testimony of a majority of the witnesses, and was admitted on the argument by the proctors for libellee.

As to the dangerous position in which the "Dunreggan" lay when she was pulled off the reef by the combined efforts of the three salving vessels, the "Iroquois", the "Eleu" and the "Fearless", there can be no question. The report of the surveyors, Messrs. Williamson, Davis and Campbell, sent out by the Agent of the Lloyd's in Honolulu, introduced in evidence as Libellee's Exhibit H., and made after an inspection on the 8th of August, soon after the ship went upon the reef, states that they "found the ship's draft when she went on the reef was 9 feet 8 inches. * * * we found the ship making water at the rate of 4 inches per hour and had 21 inches of water in the wells.

"The port pump was not in working order, owing to the loosening of the cement in the bottom. Found the ship bumping very

heavily and lifting the mainmast up several inches; the rudder working up through the deck about 8 inches according to the swell."

Some point is made to the effect that the ship was on soft coral, but whatever the character of the rock upon which the ship rested, the evidence is that she was gradually bumping herself to pieces; the water for some distance around the ship was colored with the broken pieces of coral ground fine by the ship's action upon it; she was leaking badly and as appears from the testimony of the diver Young, who examined her bottom after she was taken into the port of Honolulu, and who testified upon the hearing before the Referee "eight of her frames were injured and bent entirely away from the plates, about four frames off from the keel up.....the bottom of the ship was bent inand those frames are bent sidewise.....the keel forward is bent slightly to the port side.....the rivets in the plates were all spit out and the rudder was injured."

That the vessel was seriously damaged by her perilous experience and unable to go to sea with a cargo without necessary and extensive repairs seems to be admitted. As to the actual amount necessary to be paid in order to put the vessel into sea-going condition, and which cannot be well done in Honolulu owing to the lack of mechanical appliances and conveniences for so doing, there is some difference of opinion among the witnesses for libellant and libellee, the estimated amounts varying from \$15,000 to \$35,000 for temporary repairs at Honolulu and expenses, and permanent repairs elsewhere; and which in the opinion of the Court will not exceed, and for the purposes of determining the amount of salvaged property is hereby held to be, \$5,000 for temporary repairs and expenses and \$20,000 for permanent repairs to the ship.

To the unprejudiced mind, the unanimity of the evidence as to the fact of the injuries sustained by the vessel and the cost of repairs, (although varying in amounts,) is sufficient to settle the proposition of the dangerous position of the "Dunreggan" when she was rescued.

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There is some testimony upon the subject of what might have been done, but the Court will not consider seriously any hypothetical means for saving the vessel after she had been rescued by the salvors and after the dangers were passed.

It may be and doubtless is true that in the hurry and excitement of a wreckage like this, the very best thing is not done and possibly the very best thing was not done in this case, but enough was done to save the ship although damaged seriously by her rough experience and to save also a cargo worth with the freight \$54,266.59. It now ill becomes the Captain or other officers of the "Dunreggan" to say that this could have been done by other means, but which means were not employed. No subsequent opinions of the officers of a wrecked vessel looking backward as to what they might possibly have done but which they did not do can in anywise disparage or undervalue what was done by the salvors. The *Alaska* and her cargo, 23 Fed. Rep. 597-608; the *T. F. Oaks*, 87 Fed. Rep. 229-232; The *Winifred*, 102 Fed. 988-990.

It appears from the evidence that the "Eleu" rendered services on the afternoon of the 8th of August covering a period of some four or five hours, but that when her spring broke, she slipped her hawser and left the "Dunreggan" with the "Fearless" still unremittingly towing at the vessel where she had been constantly from 11 a. m. of that day. That the "Fearless" contained to work without cessation in her efforts to release the vessel and without any interruption (save for three quarters of an hour when she broke her hawser) for the period of thirty-two hours, when the vessel finally came off the reef.

The "Eleu" did not return to the scene of the disaster until an hour before the vessel came off the reef on the afternoon of the 9th, and within forty-five minutes after the "Eleu" had joined her efforts to those of the "Fearless" and the "Iroquois." The "Iroquois" had been tugging hard at the vessel on the 9th in conjunction with the "Fearless" from about 2 p. m. until 4:10 p. m. when the vessel was floated. The "Iroquois" was the most powerful of the three salving vessels, having a horse power of

about 1,100; the "Fearless" next with 812 horse power, and the little "Eleu" with a horse power of from 350 to 400, as appears in testimony. The steady strain exerted by the "Fearless" during the 32 hours she had worked with the vessel had not effected her release, nor had the dual pulling of the "Iroquois" and the "Fearless" together, during the last two hours before she came off the reef; and while it is claimed by both Captain Brokaw of the "Fearless" and Pond of the "Iroquois", (and which appears to be borne out by the photograph of the three vessels showing their relative positions to the "Dunreggan" and to each other, introduced in evidence marked Libellant's Exhibit 4,) that the "Eleu" was pulling in antagonism to the "Fearless" and the "Iroquois", yet there is testimony tending to show that the "Eleu" was carried away by the wind and currents and when signalled to, she swung around in line with the other vessels and pulled her best.

In any event, considering the relative power of the three vessels, it is doubtful to say the least that the "Eleu" was the moving factor or accomplished much in the withdrawing of the "Dunreggan" from the reef, considering that the combined efforts of the "Iroquois" and the "Fearless," two powerful vessels, had up to that time failed to move the vessel. Yet within 45 minutes after the "Eleu" had joined her efforts to those of the other two, the ship came off the reef. It may be that the "Dunreggan" was on the point of yielding or possibly a favoring swell or higher water caused by the tide was the reason, but it may be also that the "Eleu's" strength was the last modicum of force needed to cause the final withdrawal of the ship from her perilous position.

It is settled in the mind of the Court that in considering the amount of salvage to be awarded, the "Fearless" is first. The "Iroquois" having asked no salvage, however efficient the Court may consider her services, it cannot decree remuneration therefor; the "Eleu" having been paid in full for the services rendered by her as per the received bill introduced in evidence, she is entitled to no further compensation. There yet remains the

claim of Captain Macauley, the intervenor, for personal services rendered by him for about an hour on the afternoon of the ninth. It seems that he was an experienced pilot, familiar with the depth of the water and the currents where the vessel was wrecked, and while counsel for libellee claims that he is debarred from demanding any salvage by reason of the "Eleu" having been paid in full for her services, upon an agreement made with Captain Hilibus on the 8th of August, and assented to as claimed by the Master of the "Dunreggan" by Captain Macauley when he arrived on the scene on the 9th, yet it is not clear to the Court from the testimony that Macauley and Dixon understood each other or that there was any meeting of minds between them on that day in the nature of an agreement. The Court is inclined to believe that Captain Macauley was a volunteer, when his services were accepted by the Captain of the "Dunreggan", and that he simply responded, "yes", to the inquiry of the Captain of the "Dunreggan" when he asked if it was the same boat that he (Dixon) had made the agreement with the day before, without any confirmation of said agreement. And while it is true the "Eleu" was paid for that day also, the Court is inclined to the belief that Macauley is entitled to some compensation for the services rendered by him personally as master, notwithstanding the settlement of the "Eleu." *Robertson v. Wellington*, 52 Fed. Rep. 605; *The Wellington*, 54 Fed. Rep. 901.

In the arguments oral and written submitted by the respective counsel, the chief point made by them was to show on the one hand, the reasons why the award of salvage in this case should be large; and on the other hand why it should not be; it being admitted that the "Dunreggan" was in danger and that the "Fearless" performed salvage services in rescuing her. But counsel for libellees claims that such services were not entitled to much reward. To sustain that position he says there was no danger to life on either the ship "Dunreggan" or the tug "Fearless." To be exact, he claimed there was "not the slightest danger to life." He argued that this was so because the weather was fair and continued fair during the period the "Dunreggan" was on

the reef, and that she was pulled off the reef before she was wrecked. Assuming it to be true that there were no lives imperilled, yet the Court cannot see why reasonable salvage should not be allowed for meritorious effort to save the ship and cargo. There were some twenty-four men on board of the "Dunreggan." While the ship was safe, they too were safe. But if a storm had arisen, all the testimony bears out the presumption that the ship would have been pressed back upon the reef and become a total wreck, and the lives of those on board would have been in peril. And if in peril would not these seamen naturally have sought for the assistance of the officers and men of the tug "Fearless" who were near them on the sea during the day and night of the 8th of August; and they were there to aid them. There can be no question that if the ship had become an hopeless wreck the men on her would have been wrecked also. Looking back upon their good fortune in being rescued, and because no heavy sea rolled in upon them to send them into the breakers, affords but a slight argument that their lives were not in danger. Nor was it necessary to entitle these libellants to fair and reasonable salvage that some one should lose his life or be in imminent peril of losing his life. If the salvors persistently did all they could do to save the ship and at the same time avoid the danger which a loss of the ship would cause to the men on board, they are entitled to fair and liberal compensation in the event of success. The Court thinks the salvors did this. No ship is safe stranded on such a reef as was the "Dunreggan," and when she was saved from danger the men on board were saved from danger. No one doubts but if the ship had been cast broadside on this reef she would have broken to pieces, and it is in evidence that she was in hourly danger of swinging around broadside to the sea on the reef. Every wave that rolled by, pounded her harder on the reef and every blow she struck on the bed of rock on which she rested weakened her. Her steel frames were being twisted out of shape, her steel plates were pulling apart, her rudder was injured, her pumps were fast becoming useless. Indeed she was already a wreck, for

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more than one-third of her value had been pounded out of her. In that situation was it not a matter of congratulation for all the men on board of her during the night of the 8th of August, to know that in the open sea in front of the "Dunreggan" lay the "Fearless" pulling to keep her head to the wind and to prevent any further disaster to her? The captain and the other officers of the "Fearless" were all night awake and watchful. In the opinion of the Court it is for such services as these and for the encouragement of such services, that salvage is allowed. The ship was saved and most of her cargo was saved and all the lives on board of her were saved; and while for the saving of life there is no salvage, yet the "Fearless" was there to save life as well as property.

While it is true that every case of salvage must in a sense stand on its own merits, yet Courts are controlled largely by precedent, and if this Court is to consider standing decisions as to the amount of salvage allowed, it cannot but be influenced in determining the amount of salvage by the fact that between 1797 and the year 1896, there were over forty cases decided by the Federal Courts of the United States where the amount of salvage allowed was fifty per cent. and over of the value of the property saved; and between 1792 and 1892 there were thirty-nine salvage cases decided by the Federal Courts of the United States where the amount of salvage decreed to the salvors was under fifty per cent., but in excess of twenty-five per cent. of the property saved; and between the years 1816 and 1896 there were forty-three cases decided by the same Courts where twenty-five per cent. and under of the property saved was allowed to the salvors. (Note to the *Lamington*, 86 Fed. 675; 695-6,) where the Court says in reference to the cases cited, "enough cases are hereinbelow given to show the prevailing rates; the list is reasonably exhaustive."

As was said in the case of *The Kimberley*, 40 Fed. 289, 300-1, "On the subject of proportions, the cases show generally that the old rule of allowing to the salvors arbitrarily, in every case, half the values saved no longer obtains. Indeed that rule

came at last to so revolt the Courts of admiralty that in their repugnance to it they went far towards the other extreme, and manifested a temper to discard the idea of proportions and to confine themselves too much in their awards to the *quantum meruit* estimate of salvage services. There has latterly however, been a recurrence, except in cases of towage, from extreme views in that direction to the middle ground of adapting the amount allowed to the circumstances of each case; giving always the *quantum meruit* and giving also when the case calls for generous treatment, a liberal bounty proportioned to the value of the property saved, taking into consideration, also, the value of the property lost; giving a larger proportion where all the property is saved, and a smaller one where more or less of it is lost."

See also *The Penobscot*, 103 Fed. Rep. 205.

It has been held that "in general the rate of salvage ought not to be less than one-third, unless the property be very valuable or the service very inconsiderable." *Desty on Shipping and Admiralty*, Sec. 320, and cases there cited.

After a careful reading of the testimony taken in this case and of the briefs of the various counsel, the Court is of opinion that the value of the "Dunreggan" when she went upon the reef was \$65,000; that the amount of money necessary to repair her will be \$25,000, leaving her present value \$40,000. It is conceded that the value of the cargo and freight saved is \$54,366.59, making a total valuation of the property saved \$94,266.59.

Considering all the circumstances of the case, without reference to the question of proportions, the Court is of opinion that a reasonable compensation to the salvors in view of the amount of property rescued should be the sum of \$12,000, to include the services of all three vessels. That of this amount the "Iroquois" would have been entitled to \$3000 if she had made any claim for salvage; not having done so that amount inures

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to the ship "Dunreggan" and her cargo; that the "Eleu" has been already paid and receipted in full for her services amounting to the sum of \$157.70, also to be deducted from said sum of \$12,000. Captain Macauley is entitled to some compensation for the services rendered by him and the Court hereby awards him the sum of \$500. That the balance of said \$12,000 after deducting the said \$3000 and the sum of \$157.70 already paid by the "Dunreggan;" and after the payment to Captain Macauley of said \$500 as aforesaid, to-wit: \$8,342.30 is ordered distributed as follows: \$1300 thereof to the master and crew of the tug "Fearless" in the following manner: To Captain G. H. Brokaw, \$600; to Richard B. Seike, the mate of the "Fearless," \$200; to Bert Wheeler, the chief engineer, \$150; to J. S. Purdie, the assistant engineer, \$100; to Dave Rees and C. Torkelsen, deck-hands, each \$50; to William Parker and J. Hancock, firemen, each \$50; to John Johnson, the cook, \$35; and to J. Wiese, the mess boy, \$15, constituting the master and crew of the "Fearless;" the balance of \$7042.30 to go to J. D. Spreckels Brothers & Co., the libellant herein, as owner of the tug "Fearless" in full for the services of the tug and including all expenses incurred by the tug "Fearless" in the rescuing of the "Dunreggan."

Let judgment be entered accordingly.

IN THE MATTER OF THE PETITION OF WILLIAM H.
MARSHALL, for a writ of *habeas corpus*.

DECIDED: OCTOBER 23, 1900.

1. Upon an application for a writ of *habeas corpus* on the ground that the petitioner is deprived of his liberty contrary to the Fifth and Sixth Amendments to the Constitution of the United States, in that he had been convicted of an infamous crime without the indictment or presentment of a Grand Jury and by a verdict of less than twelve jurors, where it appeared that after the annexation of Hawaii to the United States and before the 14th day of June, 1900 (when the Act of Congress for the government of the Territory of Hawaii went into effect), the petitioner was con-

victed in the Circuit Court of the Territory of the offense of publishing a libel in the first degree by the verdict of nine out of twelve jurors, under Section 1345 of the Civil Laws of Hawaii and sentenced to hard labor for six months under Section 305 of the Penal Laws of Hawaii; and where by Chapter 1, p. 52, Section 3 of the said Penal Laws it is provided that "felonies or crimes mean such offenses as are punishable with death or imprisonment for a longer period than two years or by the forfeiture of any civil or political right * * *"; and where it is further provided by Section 304 of the said Penal Laws of Hawaii that the degree of the libel shall be found by the jury, the court or "the magistrate authorized to decide on the facts," Section 584 of the said Penal Laws giving the District Magistrate jurisdiction for the "prosecution, trial and sentence of any person charged with * * * any misdemeanors * * *."

Held, that the offense whereof the petitioner was convicted and sentenced was a misdemeanor under the laws of Hawaii, and was not an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States.

2. The Sixth Amendment to the Constitution of the United States applies only to trials of offenses which are triable by what is known as a common law jury, and are above the grade of misdemeanors, which latter offenses are peculiarly within the jurisdiction of magistrates sitting alone, and do not necessarily require a jury.
3. The petitioner not having been accused of an infamous crime, had no constitutional right to a presentment or indictment by a Grand Jury under the Fifth Amendment to the Constitution of the United States.
4. A verdict of a jury of nine out of twelve jurors was authorized by the law of Hawaii, which law in respect to this class of cases was not repealed until June 14, 1900, and after the proceedings instituted in this matter.
5. While the United States District Court has discretion to summarily discharge on *habeas corpus* any person restrained of his liberty under a judgment of a territorial court, yet it is only in extreme cases that the District Court will exercise such discretion; but will generally leave the petitioner to his remedy by writ of error from the Supreme Court of the United States.
6. Where no Federal question is presented for the consideration of the United States Court on an application for a writ of *habeas corpus*, said Court has no jurisdiction to entertain the writ.

HABEAS CORPUS.

J. T. De Bolt, attorney for petitioner.

George D. Gear, amicus curiae, (for petitioner.)

E. P. Dole, Attorney General, for the Territory of Hawaii.

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John C. Baird, U. S. District Attorney, for the Territory of Hawaii.

*A. S. Hartwell, W. O. Smith and Abraham Lewis, Jr.
amici curiae (for respondent.)*

ESTEE, J. The petitioner, William H. Marshall, filed his petition for a writ of habeas corpus on October 11th, 1900, setting up the following facts:

That he is a citizen of the United States and of the Territory of Hawaii; and that he is now and since the 9th day of October, 1900, has been unlawfully restrained of his liberty and imprisoned by one Arthur M. Brown, the High Sheriff of the Territory of Hawaii, and that such imprisonment "is illegal and in violation of the Constitution of the United States of America;" that the illegality therof consists in this, to-wit: that on the 18th day of May, A. D. 1900, the petitioner was put to his trial in a criminal case "in the Circuit Court of the First Judicial Circuit, Hawaiian Islands, wherein the Republic of Hawaii was plaintiff and said William H. Marshall was defendant, he being charged with the offense of publishing a libel in the first degree in Honolulu, Island of Oahu, Hawaiian Islands, on or about August 27th, 1899."

The character of the pleading upon which he was so charged is not set forth in the petition but it is alleged that he was put upon his trial "without a presentment or indictment by a Grand Jury, contrary to the Fifth Amendment of the Constitution of the United States," and that the offense charged is "an infamous crime;" that upon the resulting trial, a verdict was returned by nine members of the jury, three jurors dissenting therefrom, finding the petitioner "guilty of libel in the first degree," which verdict it is alleged "is contrary to the Sixth Amendment to the Constitution of the United States;" that on the 18th day of May, 1900, judgment was rendered upon said verdict and the said Circuit Court sentenced the petitioner to imprisonment "at hard

labor for the term of six months;" the petitioner taking the proper exceptions. The several steps followed in taking the case to the Supreme Court of the Territory of Hawaii on appeal are recited, concluding with the statement that "the said Supreme Court of the Territory of Hawaii in said case on the 9th day of October, A. D. 1900, rendered its decision in said cause overruling said exceptions and remanding the defendant to prison."

It is further set forth that the cause or pretence of said imprisonment is "by virtue of a certain void and illegal process issued out of the said Circuit Court * * * to-wit: a certain alleged mittimus based upon said void and illegal charge, verdict and judgment, whereby the said High Sheriff was and is ordered to take petitioner into custody and to cause the said sentence and judgment to be executed."

The petition concludes with the usual prayer for the writ of habeas corpus to issue. A writ was issued, returnable to this Court on October 18th, 1900, at 10 o'clock a. m., at which time the body of the petitioner was produced in Court and respondent filed his return to the writ. Briefly, respondent justifies by showing "that the said William H. Marshall is now and has been since the 9th day of October, A. D. 1900, detained and confined in the Oahu jail under and by virtue of the authority of a certain mittimus to the said High Sheriff directed," a copy of which is attached to and made a part of the said return.

It was admitted on the argument by all the counsel engaged therein both for petitioner and respondent, that libel in the first degree, the offense charged against the petitioner, was a misdemeanor under the penal statutes of the Territory of Hawaii, and that petitioner was not charged or convicted of "an infamous crime."

The petitioner bases his claim for his discharge under the writ of habeas corpus applied for, upon the ground that he was tried, convicted and sentenced "without a presentment or in-

dictment by a grand jury;" that he was found guilty by a verdict of nine out of a jury of twelve; that the offense charged against him was "an infamous crime;" and that the whole proceeding of the territorial courts was in violation of and contrary to the rights secured to him by the Fifth and Sixth Amendments to the Constitution of the United States.

The question presented is: Can this Court, except in very rare and extreme cases, review on habeas corpus the verdict and judgment of the highest territorial Court of Hawaii in a criminal case wherein a constitutional question is claimed to be involved, and overrule the action of that Court?

From the date of the passage of the Judiciary Act of 1867 until now, the Supreme Court of the United States, while always holding that a United States District or Circuit Court had the power in extreme cases to summarily discharge a party from custody who is restrained of his liberty in violation of the Constitution of the United States, yet the same Court has uniformly held that except in the most extreme cases, the true course for the petitioner was to sue out a writ of error from the Supreme Court of the United States, and thus have the constitutionality of the conviction settled by the only Court in the land whose judgment on constitutional questions is final. This rule was adopted because, although the discretionary power existed, yet it was of more than doubtful propriety for a single United States District or Circuit Judge to interfere with the judicial procedure of a state or territorial Court when dealing with criminal cases.

It was held in the case of *New York v. Eno*, 155 U. S. 89, that:—

While the United States Courts had the discretionary power to issue the writs of habeas corpus, and to summarily dispose of a party as law and justice requires, "yet that discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union

and of the States; and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between Courts equally bound to guard and protect rights secured by the Constitution. * * *

And again—"Where a Circuit Court erred in granting the prayer of the petition, the Supreme Court would reverse its action."

The Court holding in that case, "that the judgment is reversed with directions to dismiss the writ of habeas corpus and to remand the accused to the custody of the proper authorities."

It must be admitted as settled law, that this Court like all subordinate Courts is bound by precedent and peculiarly so where the question involved is one of constitutional law. The Supreme Court of the United States in the very recent case of *Markuson v. Boucher*, 175 U. S. 184, seems to have decided the question of jurisdiction involved in this case beyond dispute. It held as follows:

"We have frequently pronounced against the review by *habeas corpus* of the judgments of State Courts in criminal cases because some right under the Constitution of the United States was alleged to have been denied by the person convicted, and have repeatedly decided the proper remedy was by writ of error * * * We lately stated the rule," said the Court, "and the reasons for it in the cases of *Baker v. Grice*, 169 U. S. 284, and *Tinsley v. Anderson*, 171 U. S. 101-4."

The Court then proceeds to quote approvingly and at length from the latter decision as well as from *Baker v. Grice* and adds that:—

"The jurisdiction is more delicate, the reasons against its exercise stronger when a single judge is invoked to reverse the decision of the highest court of a state in which the constitutional rights of a prisoner could have been claimed, and may be were rightly decided, or if not rightly decided could be reviewed and redressed by a writ of error from this Court."

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There is a long line of authorities sustaining the same proposition that, except in peculiarly urgent cases, no United States Circuit or District Court will discharge a prisoner by *habeas corpus* in advance of the usual and orderly course by writ of error from the Supreme Court of the United States. (*Pepke v. Cronan*, 155 U. S. 100; *In re Frederick*, 149 U. S. 70-6; *Whitten v. Tomlinson*, 160 U. S. 231, 242; *In re Duncan*, 139 U. S. 449, 454; *In re Wood*, 140 U. S. 278, 289; *Cook v. Hart*, 146 U. S. 183; *In re Loney*, 134 U. S. 372.

So also in the case of *In re Spickler*, 43 Fed. Rep. 653, where it was held:—

“That where it appears the petitioner is held under the judgment of a State Court of competent jurisdiction before this Court should grant him a discharge it should be made to appear that the illegality of his detention is beyond fair question, and in all cases where the pivotal point has not been finally decided by the Supreme Court, but still remains a debatable question, the Circuit Court should not discharge the prisoner * * * in such cases the Federal question can be readily presented to the Supreme Court, and as there exists this plain and proper remedy, it should be followed.”

The above decisions which seem to all relate to the States, apply with equal force to the Territories.

See *Shute v. Keyser*, 149 U. S. 649, where it was held:—

“An appeal or writ of error lies to this Court (the Supreme Court of the U. S.) from the judgments or decrees of the Supreme Courts of the Territories, except in cases where the judgments of the Circuit Courts of Appeal are made final.”

See also *Aztec Mining Co. v. Ripley*, 151 U. S. 79.

For the reasons above given, the Court holds that it cannot assume jurisdiction of this case. But is there a proper Federal question involved herein? If there is not, then there is an additional reason for not assuming jurisdiction because it is settled that a writ of *habeas corpus* must be denied if it is apparent

that the only result of its issue would be the remanding of the prisoner to custody. *In re Boardman*, 169 U. S. 39.

The conditions which existed on these Islands when annexed to the United States were unusual. This Territory had a civilization peculiar to itself, a government republican in form, with a written Constitution, civil and penal statutes, courts of justice with established jurisdiction. It had public schools and other institutions of learning and laws enforcing compulsory education. It was not mere territory lying in mid-ocean unused, but ready for man's use. It was a free, enlightened state possessing all the attributes of sovereignty, and when with its consent, the Islands were annexed by the United States, not only the lands, but the people with their laws and customs were annexed; and by the well established law of nations, these laws and customs remained in force until new laws were enacted for the government of the Territory. Sec. 19, *Sutherland on Stat. Construc.*, page 19; *Black on Constitutional Law*, page 208; *American Ins. Co. v. Canter*, 1 Pet. 511, 541; *Cross et al. v. Harrison*, 16 How. 164, 184.

These Islands, although originally a monarchy, had become a republic and the people were somewhat versed in the principles of self government. So much was this so, that Congress waited nearly two years before enacting a law for the government of the Territory. In the meantime, no laws were enforced in the Territory of Hawaii but the laws of the Republic of Hawaii. The strong arm of the Federal government was not felt here. The former laws and judicial procedure remained and continued in force until the 30th day of April, 1900, when Congress passed the Enabling Act which went into effect on the 14th day of June, 1900. This Act though providing for a different form of government for the new Territory of Hawaii, continued in force many of the former laws of the Islands and prescribed especially:

"That all suits at law and in equity, prosecutions and judgments existing prior to the passage of this Act shall continue to

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be as effectual as if this Act had not been passed. (Sec. 10, page 6. "Act to provide a government for the Territory of Hawaii.")

The offense charged and described in the petition for the writ of *habeas corpus* is libel, which under the laws of Hawaii is a misdemeanor. Section 305 of the Penal Laws (chap. 32, page 135) fixes the maximum punishment upon conviction for libel in the first degree at not more than one year's imprisonment at hard labor or by fine not exceeding one thousand dollars.

Felony is defined in the same laws, chapter 1, page 52, as follows:

"Sec. 3. The terms felony and crime are within the meaning of the provisions of this Code synonymous, and mean such offenses as are punishable with death or imprisonment for a longer period than two years or by the forfeiture of any civil or political right, and also larceny. Any offense not appearing to be a felony or crime is a misdemeanor."

Section 304 of the same laws, divides the offense of libel into "two degrees and the degree is to be found by the jury, or determined by the Court or magistrate authorized to decide on the facts."

Section 584 gives district magistrates jurisdiction "for the prosecution, trial and sentence of any person charged with either of the following offenses, namely: any misdemeanor.* * *"

It thus appears that there may be a trial and conviction for libel by a Court or magistrate without the intervention of a jury. There was, however, in this case a trial by jury as shown by the petition, the grievance set up being that the verdict of guilty was found and returned by nine jurors, whereas three jurors dissented "which verdict" the petitioner alleges, "was and is contrary to the Sixth Amendment of the Constitution of the United States."

Section 3, Article 6 of the Constitution of the Republic of Hawaii, authorized the Legislature to fix the number of jurors required to agree on a verdict in "offenses less than felonies."

In pursuance of this constitutional provision there was enacted by the Legislature of the Republic of Hawaii (Sec. 1345, Civil Laws), a law providing that "no jury, for the trial of any case, civil or criminal, shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve."

The first point urged upon the Court was that the petitioner had been convicted of "an infamous crime," but upon the argument it was admitted that petitioner was not convicted of an infamous crime but of a misdemeanor which seems to be borne out by the statutes of the Republic of Hawaii herein before referred to.

At the common law the crimes which rendered a person infamous were treason, felony and *crimen falsi*. *U. S. v. Block*, 4 Sawy. 211. In the same case it is held that it is not the character of the punishment, but the nature of the act that makes the crime infamous.

The Sixth Amendment of the Constitution manifestly applies only to trials of criminal offenses which are triable only by jury and by what is known as a common law jury, and are above the grade of misdemeanors, which latter offenses are peculiarly within the jurisdiction of magistrates sitting alone, and do not necessarily require a jury.

As before stated, Section 83 of the Act of Congress for the government of the Territory of Hawaii, in part reads as follows:

"That the laws of Hawaii relative to the judicial department including civil and criminal procedure * * * are continued in force subject to modification by Congress or the Legislature * * * No person shall be convicted in any criminal case except by unanimous verdict of the jury."

"One of the amendments of the Enabling Act was to repeal the law authorizing less than unanimous verdicts in criminal cases. But this repealing clause only took effect when the En-

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abling Act became a law, to-wit: June 14th, 1900, while this petitioner was convicted May 18th, 1900."

It was held in the case of *Maxwell v. Dow*, 176 U. S. 581, that:—

"Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are proper to be determined by the citizens of each state for themselves, and do not come within the fourteenth amendment to the Constitution so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure, and to have the same kind of trial, and equal protection of the laws is secured to them."

The Court finds that petitioner's remedy is by writ of error from the Supreme Court of the United States; that the offense whereof the petitioner was convicted and sentenced was a misdemeanor and not an "infamous crime;" that there was no constitutional right under the fifth amendment to the Constitution of the United States to a presentment or an indictment by a grand jury in this case; and that a verdict of nine out of twelve jurors was authorized by the law of Hawaii which law in respect to this class of cases was not repealed until June 14, 1900, and after the trial of this case.

It appearing that no Federal question is presented for the consideration of this Court, it is without jurisdiction to entertain the petition for the writ of *habeas corpus*.

Let the petitioner be remanded.

IN THE MATTER OF THE APPLICATION OF WONG
LIN ON BEHALF OF WONG CHIONG, for a writ of
habeas corpus.

DECIDED: NOVEMBER 5, 1900.

1. The Territory of Hawaii is a part of the United States, and subject to the so-called "Chinese Exclusion Laws" passed by Congress.

2. Where a Chinese person claims admission into the United States on the ground that he is a citizen thereof, the burden of proof is on him to prove such contention.
3. Application for a writ of habeas corpus applied for alleging detention by the Collector of Customs of the port of Honolulu with intent to return petitioner to China, heard by the Court, where the petition alleged that petitioner was a citizen of the United States, having been born in the Hawaiian Islands.
4. The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person claiming the right to enter the United States on the ground that he was born in this country, where, as in this case, he left the Hawaiian Islands, the alleged place of birth, when he was seven years of age, and did not return until after the lapse of twelve years; and specially where the testimony of the person claiming admission shows not the slightest recollection of the place where he claims to have been born or of its people; and there being no direct testimony that he was born in the Islands given even by the Chinese witnesses.

CHINESE EXCLUSION LAW. HABEAS CORPUS.

Paul Neumann, attorney for petitioner.

John C. Baird, U. S. District Attorney for respondent.

ESTEE, J. This is a proceeding in *habeas corpus* initiated by one Wong Lin, who states in his petition that he is and has been for twenty-one years last past, a resident of the Territory of Hawaii; that one Wong Chong is his son and that he was born on the Island of Oahu, in the Hawaiian group in 1881; that in the year 1888, the wife of petitioner left the Hawaiian Islands and returned to the Empire of China, taking with her the said Wong Chong and another son. It is further alleged that Wong Chong returned to Hawaii on or about September 23, 1900, on the steamer "Coptic" from Hong Kong, but was refused the right to land by the Collector of Customs of the port of Honolulu, who unlawfully restrained him of his liberty on the ground that Wong Chong is not entitled to land in the United States.

The return recites that the body of Wong Chong is produced in Court in obedience to the writ; it admits the restraint, but denies that the same is unlawful or that the said Wong Chong

is entitled to land in the United States, or that he was born herein. It is alleged that the father of the subject is a Chinese laborer and that Wong Chong is himself an alien Chinese laborer and therefore not entitled to come into the United States.

This petitioner seeks the admission of his reputed son, Wong Chong, under the claim that he was born in the Hawaiian Islands, and therefore is a citizen of the United States and entitled to land as such.

The first question presented is whether or not Wong Chong was born in these Islands.

In this class of cases, the burden is on the party seeking admission to prove that he was born in the United States.

In re Jew Wong Loy, 91 Fed. Rep. 240; *Lee Sing Far v. U. S.*, 94 Fed. 834; *In re Louie You*, 97 Fed. Rep. 580.

Wong Lin, the reputed father of Wong Chong, the party seeking admission, hesitated about testifying directly as to the place of his son's birth. In reply to a question as to when he came here, he testified:

"My wife came here in 1880; I came here in 1878."

And in response to the following question put by his counsel,

Q. "Now then, did you have any children by your wife while you lived here?" answered—

"I had children; I have when the children come to her * * * my wife left the islands in 1888. She left here for China—my boys went back with my wife * * * I never registered their births—the eldest boy was seven years old when he went back to China, the youngest was two years old."

It will be seen that this man claiming to be the father of Wong Chong does not testify directly or clearly that the boy was born in the Islands. And in response to repeated efforts on the part of counsel to elicit some facts from Wong Chong, the young man himself, he utterly failed to state any fact about the Hawaiian Islands, or of his residence here, and failed to remember any words of either English or Hawaiian he may have learned

ed while here. He spoke only Chinese. Yet the testimony shows that if he left here at all, he was seven years of age at the time of his departure, an age sufficient to have left some slight remembrance of the place where he was born or of its people. He simply testified that his mother told him he was born in these Islands, and claims to have remembered only that he went away from here on a vessel to China.

Three other Chinese witnesses, friends of the putative father, strove to identify the young man as the son of petitioner, but in no one instance did they testify directly as to his having been born here. Wong Tack, said "the eldest was seven and the youngest was two years old when they left here and I recognize both of them. I did not know Wong Lin's boys would be in Court yesterday. I first saw them yesterday afternoon. When I first saw them in Court I knew they were Wong Lin's boys." He had previously testified that he had seen the boys at the home of Wong Lin prior to their departure for China, twelve years ago. But it does not seem reasonable to suppose that this witness could recognize these boys after the lapse of so many years, and when the eldest at least had almost grown to manhood.

Lau San, another witness, was uncertain as to his recollection of the boy or of his recognition of him as Wong Lin's son. He said "I remember the elder one when he went back to China, but now I can't remember him." While Lau Hee Fan, the last of the three Chinese witnesses, had no memory at all, stating "the father told me that the boy went back to China with the mother," and when asked if he recognized one of these boys, now, he answered—"Well, it is so long I have not memory. There was a celebration one month after the boy was born, a celebration in the Chinese way."

There were no white witnesses produced on the hearing; all material facts were offered by the reputed father, Wong Chong, the party seeking admission and these three Chinese friends.

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It was said in the case of *In re Louie You*, 97 Fed. Rep. 580, that—

"The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person claiming the right to enter the United States on the ground that he was born in this country, where it is admitted that he left it when he was three years old and has remained away for sixteen years."

See also the case of *In re Lau Sam*, decided by this Court August 22nd, 1900. (*)

And in this case there is no definite testimony even by the Chinese witnesses that the boy Wong Chong was born here.

Since 1882, the Congress of the United States has legislated against Chinese laborers coming into this country. The right to do so legislate not only exists in Congress by reason of the sovereign power of the nation, but because of the treaty relations with the Empire of China.

It is historically true that the supply of Chinese laborers is unlimited in number and that its continued and unrestrained immigration into the United States tends to crowd out free American labor from following its usual pursuits and thus decreases the demand for and lowers the value of such labor. Chinese laborers come to America to work only (being better paid here than in their own country), and not to become a part of the body politic; they rarely bring their families with them or encourage American home life; they are always Chinamen in America and not Americans; they live apart here as in China. It thus seemed dangerous to the American republic to admit on an equal footing with American labor, these vast hordes of Chinamen who neither love this country nor assimilate with its civilization. The presence of such a people tends to create class and racial distinctions, and tends also to lower the standard of American manhood, by placing beside American men competing in the field of labor, a different race of men, who know nothing of free institutions and only seek our shores for a tem-

porary advantage. The wisest American statesmanship therefore thought it necessary to limit the large and ever increasing influx of a class of foreign laboring men who as before stated, did not and from racial and other reasons could not, assimilate with and become a part of American civilization, and hence the passage of the various restriction laws upon Chinese immigration as a matter of protection to American labor.

It is not questioned that the Territory of Hawaii is now a part of the Territory of the United States, and subject to the exclusion laws which have been passed by Congress in relation to the Chinese.

Section 5 of the Act of Congress to provide a government for the Territory of Hawaii, (vol. 31, U. S. Stats., page 141), prescribes that—

“Except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.”

See also Section 101 of the same Act.

The fact that most of the capital and the larger part of the labor of these Islands are engaged in the production of sugar cane, has created a demand for cheap labor, and the national Chinese exclusion acts while they may seem to be in conflict with the monetary interests of the Territory of Hawaii will yet be of permanent advantage to the people of the Territory by encouraging local and American labor. These laws were inspired by a regard for the good of the American people as a whole, of which the citizens of this Territory now form a part.

It therefore becomes necessary for the United States Courts to scrutinize closely any attempt to evade these exclusion acts upon the part of Chinese laborers seeking to enter the Territory of the United States.

Wong Chong failed to prove to the satisfaction of the Court that he was born in these Islands. It is therefore unnecessary

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to consider the further question involved herein as to whether if he had been born here nineteen years ago before this Territory became annexed to and a part of the United States, he would have been a citizen of the United States and entitled to land here now.

The writ is denied. Let him be remanded.

(¹) *In re Lau Sam, Ante* p. 6.

J. S. LOW *v.* THE STEAMSHIP CLAUDINE and THE
WILDER STEAMSHIP COMPANY,
and
JOHN PILTZ *v. Id.*

DECIDED: DECEMBER 20, 1900.

1. In an action against a steamer for a collision with a barkentine in the night time in which the barkentine was sunk with all her cargo, where it appeared from the weight of the evidence that the barkentine had all her lights burning properly, and was sailing in a southwest course when the steamer sighted her, and continued on that course, as was her duty under the regulations; and where it appeared from the testimony of the officer of the deck on the steamer that he had seen the lights of the barkentine some fifteen or twenty minutes before the collision occurred, but was in doubt as to the direction in which they were moving, and who, after watching the same without making any attempt to change his course or slacken the steamer's speed, which was then at the rate of 10 knots an hour, finally left the deck and went down to the cabin to find the Captain, leaving no one on the deck, excepting the man at the helm, and not finding the Captain, returned to the deck and blew the whistle once to call the attention of the Captain, and within one minute thereafter the collision took place; and where it further appeared that no regular lookout was kept on said steamer, as required by Rule 29 of the Regulations for preventing collisions at sea (Vol. 26, U. S. Stat., P. 320) and Article 24 of the Sailing Regulations (Penal Laws of Hawaii for 1897, P. 540); Held, that the collision was due to the negligence and unskillful navigation of the steamship, for which the steamship and her owners are liable.

2. All vessels should have a competent lookout stationed in such a position that he can descry approaching vessels at the earliest possible moment; and the want of an adequate lookout on board a vessel at sea is culpable neglect on her part, which will *prima facie* render her responsible for injuries received from her while in that condition.
3. The fact that no lookout was kept on the steamer Claudine was unpardonable negligence, for which there can be no excuse; and by reason of which omission to keep a proper lookout, aside from other reasons, the Claudine and its owners, under the circumstances of this case, must be held responsible for the collision.
4. The failure to produce vital evidence which is under the exclusive control of one of the parties to the action if not properly explained, is taken strongly against said party especially where it attempts to introduce exhibits which seem to unfairly represent the devices not produced.

IN ADMIRALTY. DAMAGES FOR COLLISION.

Paul Neumann, for libellants.

Kinney, Ballou & McClanahan, for libellees.

ESTEE, J. The foregoing two actions have been tried together, one brought by J. S. Low, as the assignee of the owners of the cargo and of the freight of the barkentine "William Carson," alleged to be valued at \$9050, against the Wilder Steamship Company, and the steamship "Claudine" to recover the said \$9050, with costs.

The other action is brought by John Piltz, former master of the barkentine "William Carson," against the said libellees, the "Claudine" and the Wilder Steamship Company, to recover the sum of \$2474.30, alleged to be the value of certain personal effects lost by him on the barkentine "William Carson" when she was sunk by collision with the steamer "Claudine."

By stipulation between counsel for the respective parties, it was agreed that the two actions might be consolidated and tried together as the most of the testimony in both cases would be substantially the same.

The principal facts upon which the said actions are based appeared to be these:—

The barkentine "William Carson," Captain John Piltz commanding, owned by George U. Hind and others, being an American vessel of about 791 tons burthen, was on a voyage between Newcastle, N. S. W. and Honolulu, H. T. While coming down the Molokai channel, sailing free, her alleged course being south-west and going at the rate of between two and a half and three knots an hour, and being within 12 miles of Honolulu, on the evening of the 27th of December, 1899, about 8:40 o'clock p. m., the night being dark, yet clear, she was run into by the "Claudine," a passenger and freight steamer sailing out of the port of Honolulu, for the port of Lahaina, on the Island of Maui,—the "Claudine" was moving at the speed of about ten knots an hour, her general course being east, three-quarters south.

That the said "Claudine" struck the "William Carson" on the starboard bow near the cat head, from which collision the "Carson" was tipped over on her starboard side, thrown upon her beam ends, filled with water, sank and became a total loss with her cargo, freight and all personal effects on board.

That thereafter the Wilder Steamship Company, the owner of the "Claudine," bought the wreck of the barkentine at public sale for five hundred and fifty dollars, and a day or two after the collision, fastened a hawser to her stern and towed her stern first into or near the head of the harbor of Honolulu, where she was stripped of her two after masts, her sails and rigging and left sunk in the sea. The collision is admitted, the damage done is not seriously questioned, except as to the amount and value of the articles lost by Captain Piltz of the "Carson."

The allegations of the pleadings upon this proposition are as follows:

The libellant alleges in both cases, that "before and during the time when said collision took place, the said 'William Carson' carried the lights prescribed by law, which lights at the time of the said collision, were brightly burning and could have

been seen by the said 'Claudine' if she had kept a proper look-out for as much as two miles, and in sufficient time for said steamer to avoid the collision."

While the answer alleges in both cases, that the collision occurred "wholly through the fault of the said barkentine 'William Carson,' in that her starboard light was improperly placed and not visible from the steamer 'Claudine' until such time as it was impossible by any maneuvre to avoid a collision."

The issue is thus prevented between the libellants and the libellees as to which vessel was in fault for the collision.

The "William Carson" was a sailing vessel; the "Claudine" was a passenger steamer. It is admitted that the former was coming into the port of Honolulu and the latter going out of said port, and it is claimed the "William Carson" was on a south-west course, while the "Claudine" was on a course east, three-quarters south. If this be true, necessarily they would cross each other's course.

At the trial, Captain Piltz of the "Carson," Nelson the second officer of that ship, and McDonald, the man at the wheel, and in fact all those who were on the deck of the "William Carson" when the collision occurred, swore positively that the ship's course was south-west. This positive testimony of the men who must of necessity know the facts is contradicted only by some sea-captains, most of whom testified in response to hypothetical questions as to the time the lights of the two vessels might have been seen and how they were seen and the consequent course of the vessels arising from supposed conditions. No one of these witnesses was on either vessel at the time of the accident. It also appears in evidence that a south-west course was the correct course for the "William Carson" to take to get into the port of Honolulu, and the evidence seems to be clear that she was sailing that course and did not deviate therefrom at the time of the collision, but that she kept her course as is required by Article 22 of the Sailing Regulations, Penal Laws of Hawaii, (1897) 531, 540; Art. 21 of Sailing Regulations of the United States, vol. 26. Statutes of U. S., page 321.

It may be observed that one of the points most strongly relied upon by the libellees to fix the responsibility for the collision upon the officers and crew of the "William Carson" was, that the ship "Carson" did not have her lights set according to law, because they were not placed upon the ship where they could be seen by the "Claudine" in time to avoid the collision; when the fact is, the second mate of the "Claudine" admits he saw her light a long time before the collision, but that it was not the regulation light.

The legal lights of a sailing vessel as provided by Article 2 of the Regulations for preventing Collisions at Sea, approved Aug. 19, 1890, (Statutes of U. S., vol. 26, page 320, *et seq.*, and Art. 3 of the Sailing Regulations, Penal Laws of Hawaii, 1897, page 532) are the following:

"On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles.

"On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side and of such a character as to be visible at a distance of at least two miles.

"That the said green and red lights shall be fitted within board screens projecting at least three feet forward from the light so as to prevent these lights from being seen across the bow."

Did the "William Carson" have the lights placed in the manner provided for by the regulations?

Captain Piltz, master of the "Carson," testified that the red and green lights on his ship were "so placed that they could be seen from right ahead two points aft the beam; that they were thirteen feet above the main deck and could be seen two miles away, and were burning on the night of the collision; that they were fastened to the spanker rigging on to the shrouds and the

screens were fastened on to the shrouds;" and further testified that "we carried no other lights."

It was claimed by counsel for libellees both on the trial and in their brief that "the starboard light of the 'Carson' could not by reason of its illegal position be seen from a point right ahead to two points abaft the beam." This is a statutory necessity and should be complied with by every vessel sailing the high seas. "Such a fault," says counsel, "casts the burden of proof as to the responsibility of the accident upon the libellants and that libellees for that reason did not and could not have contributed to the collision."

In their argument, counsel to sustain this position, seem to rely largely upon the case of *St. Louis, etc., v. The United States*, (33 Ct. of Claims, Rep. 251). The case is not before the Court for examination, nor was it before counsel as stated by them,—they simply quote from the syllabus of the case found in the American Digest for 1899, which reads as follows:

"When a vessel has committed a breach of the rule she must show not only that her fault did not probably contribute to the damage, but that it could not have done so."

This seems to be good law, but it is not applicable to the facts in these cases as there is no evidence sufficient to show that there was any breach of the rule upon the part of the "Carson."

The "Claudine" saw a light on the "Carson" in time to stop, slow down or change her course, but she did neither and she cannot now excuse herself by saying that the light was the wrong kind of a light. The clear preponderance of the evidence is that it was a green light that was seen by the second mate of the "Claudine," because no other light was in view on the starboard side of the "Carson."

An examination of the testimony of the officers and men of the "William Carson" shows that there was little doubt as to the kind of lights on the "Carson" that night or that they were properly burning at the time of the collision.

F. A. Nelson, the second mate, testified that the lights of the

"William Carson" were "first class lights and were burning brightly."

Daniel McDonald, able seamen on board the "William Carson," testified that he "was at the wheel from 8 o'clock the night of the accident up to the time of the collision; that he put out the green light before six o'clock on that night."

Andrew Young, an able seaman, testified that "our own lights were burning bright. Both red and green."

Alexander Campbell, the lookout on board the "Carson," testified; "the lights were burning; they were there at eight o'clock."

In the mind of the Court there is no question but what the starboard green light of the ship "William Carson" was burning all of the time that the "Claudine" was in sight of her; but the issue is made as to whether this light was obscured by reason of the mizzen boom and mizzen sail extending over the starboard side of the ship.

It seems that the ship "William Carson" was a new vessel on her first voyage. The United States Inspector [at Seattle] inspected this vessel before she sailed in accordance with an Act of Congress approved December 21, 1898, and as appears from a certified copy of a certificate of said Inspector introduced in evidence by libellants marked Exhibit A., the Inspector certified that "she was of suitable structure for the service in which she was employed * * * in a condition to warrant the belief that she may be used in navigation with safety to life * * * and is permitted to navigate the waters of any ocean."

Captain Piltz of the "Carson" testified that "we had the mizzen boom about half way out towards the side of the ship * * * did not have the boom at any time out to the rail because it would not have been safe * * * the gaff would have swung out too far and would have broken the jaws * * * I never sail with the boom further out than the rail. * * * the sheet and sheet ropes were so cut that the boom could not run over the rail * * * I cut the rope so that it could not go further * * * If I had wanted to pull the boom over

the rail I could not have done so with those sheets. * * * the boom never was over the rail while I was on board."

Although it appeared at the trial, that all the rigging of the mizzen boom and mast, including the sheet was saved or could have been saved by the Wilder Steamship Company, one of the libellees, as that corporation had bought the wreck and stripped her, and though the sheet was but a short light rope, and its production would have settled the question, yet it was not produced nor its absence explained.

Nothing seems better settled in equity proceedings than that the non-production of vital evidence which is under the exclusive control of one party, if its absence is not properly explained, is taken strongly against the party not producing such evidence, especially in cases like the present, when one party attempts to introduce exhibits to represent the absent articles which exhibits seem to unfairly represent the devices which were thus kept out of Court. *Jones Law of Evidence*, vol. 1, sec. 16; *Starkie on Ev.*, 10th. Ed., page 847; *American and English Ency. of Law*, vol. 27, page 710 and cases there cited.

The sheet rope would have been the very strongest evidence possible to sustain libellees' contention if their contention was right. But the Court holds that the clear weight of the testimony is that the mizzen boom of the "Carson" did not reach over the side of the ship and did not obscure the starboard light of the "Carson" but that said light was in plain view on the night of the collision; and that it was the only light on the "Carson" which could be in view on the "Claudine" until it came so near the "Carson" that her cabin lights were visible. The two vessels did not approach each other end on. In fact Captain Weisbarth of the "Claudine" placed two models in the same relative position that he said the ships were in on that night and the Court caused the Clerk to put paper under the two models in the presence of counsel and draw a line around each vessel thus placed, forming a tracing of the position of the vessels according to his view, which plainly showed that the "Claudine" came down on the starboard side of the "Carson" and not end on.

This tracing is in the files of the Court. No after thought of explanation can change the open, frank exclamation of the first mate McAllister when he came on the deck of the "Claudine" on the night of the accident, and said "there is her green light, what are you doing on this side of her?" when the "Claudine" was then trying to cross the bow of the "Carson."

The fact is apparent that the second mate of the "Claudine" did not know his duty. He testified that he went on the bridge of the ship "Claudine" by direction of the captain about a quarter to eight p. m. of the night of the collision; that a man by the name of Fischer was at the wheel; that about a quarter past eight (a full half hour before the collision), "I saw a bright light ahead bearing east $\frac{3}{4}$ to $\frac{1}{2}$ point to port bow; first I thought it was the Molokai light; it changed its bearing. I watched it for five minutes. At this time the quarter master wished to be relieved. I went to call Antone to take the wheel; it took a couple of minutes or so. When I got on the bridge again, the light was still moving starboard; at this time there were two lights, two bright lights close to each other. I could not tell very well whether they were high or low. They seemed quite a distance off."

"I then went down to find the captain, but could not find him." He then returned to the deck, and blew one whistle to call the captain's attention. He came on deck pretty soon, when the mate testified "I showed him the light."

"He said the light was too far away to see any side-lights. The mate came on deck. He stepped forward to the scuttle, and said 'there is a green light, what are you doing on this side of her'?"

"An order was given to hard port when we struck her. I think it was a minute or it might have been a little longer before the collision, after the whistle blew. If it was a minute, the ship went 1000 feet. I got excited when I went to call the other quarter master. There was no one else to send, so I went myself. The collision took place about a quarter to nine."

"I may have seen a green light and likely I did."

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Q. "When you were on the bridge, as a lookout, there was nobody there except Fischer and yourself?

A. No.

Q. Only you two?

A. Yes.

Q. And while there you first went after the quarter master?

A. Yes.

Q. And after a while you went after the captain?

A. Yes.

Q. At any rate you only saw white lights?

A. Yes.

Q. You lost those and did not see anything?

A. When?

Q. Just before the collision?

A. I was not looking for them; maybe I saw the green lights, but I could not say. After the collision the green light I saw was burning brightly.

Q. You should not have left your station?

A. It would have been more ship-shape if I had stayed. There are only two quarter masters on all of these boats and it seems to be about the way it is done.

Q. At any rate, yourself was the only lookout there was?

A. Yes.

Q. And during that time you went below twice?

A. Yes.

Q. Leaving the vessel entirely in charge of the man at the wheel?

A. Yes.

Q. You had charge of the vessel and did not know where that other boat was going, or how it was going, or whether it was a steamer or a sailing vessel. Why didn't you slow up or stop?

A. I naturally supposed she was going the other way.

Q. At any rate there was no effort made upon the part of the steamer to stop her or slow down?

A. No.

Q. When the mate called out there is a green light, there was no chance of stopping the "Claudine?"

A. I don't know. She might have slowed down a little.

Q. But no such order was given?

A. No.

Q. Didn't she have a chance to slow up or reverse her engines?

A. I guess she could have done it.

Q. And that was not done?

A. No.

Q. On the contrary, the captain gave orders to port the helm?

A. To starboard the helm."

While Captain Weisbarth of the "Claudine," testified that he thought it was possible to have stopped the vessel between the period of time when the "Claudine" blew her whistles, and the collision.

When the mate of the "Claudine" saw the green light of the "Carson," Captain Weisbarth must have known that he was crossing the bow of a ship in motion, which is in direct violation of law (*The Excelsior*, 102 Fed. Rep. 652.) The fact seems evident that the captain and the second mate of the "Claudine" were both confused; neither knew what he was doing or apparently just what to do under the circumstances.

But if it were true that the green light on the starboard side of the ship "Carson" could not be seen by the "Claudine" dead ahead, that could not afford a defense to the action. First because the "Claudine" was at no time on the night of the collision dead ahead of the "Carson;" and second it is in evidence that the "Claudine" did see the light of the "Carson" long before the collision. The evidence seems clear to the Court that the "Carson" was sailing on a south-west course when the "Claudine" sighted her and that she continued on that course as was her duty under the regulations; that her lights were the regulation lights and shining brightly, and the "Claudine" should, after sighting the lights of the "Carson," either have changed her

course to keep out of her way, slowed down or reversed her engines if in doubt. Either course would have avoided the collision. In fact the Court is satisfied the second mate, McNeil, of the "Claudine," saw the green light of the "Carson" all the time, but did not know what to do. He practically admitted it when he said, "I may have seen a green light."

The rule giving the sailing vessel the right of way requires the steamer to keep off her course if it be practically possible to do so. *The Marguerite*, 87 Fed. Rep. 953; *The Gate City*, 90 Fed. Rep. 314.

"In the case of a collision between a steam and a sail vessel, where it is shown that the latter kept her course, the presumption rises that the collision resulted from a failure of the steam vessel to keep out of the way." *Squires v. Parker*, 101 Fed. Rep. 843.

"Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop or reverse if necessary." *Johnson v. Mayor of N. Y.*, 40 Fed. Rep. 601.

"This rule does not mean that she may wait until the danger is imminent before she slackens her speed nor that she need not slacken her speed if the risk of collision is caused by the fault of the approaching vessel; it is imperative. When risk of collision appears, it is the absolute duty of the steamer to slacken speed and not to trust to avoiding it by other means." *The Huntsville*, 8 Blatchford, U. S. 228.

When McNeil, the second officer of the "Claudine" saw the light about which he testified, instead of giving orders to do any of these things, or to take any measures or precautions which were necessary to avoid a collision, he left his post of duty twice, ran down stairs first to find the other quartermaster, and second to find the captain, remaining two minutes in the first instance, as testified to by him, and a minute on the second occasion. As was said by the Supreme Court of the United States in the case of *The Carroll*, 8 Wallace, U. S. 302.

"Nautical rules require that where a steamship and sailing vessel are approaching from opposite directions, on intersecting

lines, the steamship from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures or precautions as will necessarily prevent the two boats coming in contact."

It is evident the second officer, McNeil, of the "Claudine" was either ignorant of his duty in this respect or deliberately ignored it.

No lookout was kept on the "Claudine." This was unpardonable negligence for which there can be no excuse; and by reason of which omission to keep the proper lookout aside from other reasons, the "Claudine" and its owners, under the circumstances of this case, must be held responsible for the collision. There is not the slightest conflict of testimony on this point. But two men were on the deck of the "Claudine" on that night from the time the light was first sighted until a moment before the collision, and those two were the man at the wheel, whose attention could not be directed from his duty, and McNeil, the second mate on the bridge, who was acting as officer of the deck in command of the ship and was in no sense a lookout, and who twice unwarrantably left his post of duty.

The testimony of Captain Merry, an old and experienced officer, who had been in the marine merchant service before entering the Navy, was to the effect that, "there could be no imaginable reason * * * that would warrant the officer of the deck leaving his post."

It is provided by Rule 29 of the Regulations for preventing collisions at sea, approved August 19, 1890, (Vol. 26 Stats. U. S. Pages 320 et seq.) and by Article 24 of the Sailing Regulations (Penal Laws of Hawaii), 1897, Page 540, that,

"Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect to.....keep a proper lookout, or by the neglect of any precaution which may be required by the ordinary practice of seamen or by the especial circumstances of the case."

All vessels should have a competent lookout stationed in such a position that he can descry approaching vessels at the earliest possible moment, and the want of an adequate lookout on board a vessel, at sea, is culpable neglect on her part which will *prima facie* render her responsible for injuries received from her in that condition, *Genesee Chief et al., v. Fitzhugh*, 12 How. (U. S.) 443, 463; the *Catherine*, 17 How., (U. S.) 170; *Chamberlain v. Ward*, 21 How. (U. S.) 548; *Heney v. Packet Co.* 23 How. (U. S.) 287; the *Leonard Richards*, 38 Fed. Rep. 767; the *Excelsior* 102 Fed. Rep. 652; *Greene et al. v. Campagna Generale Italiana di Navigazione*, 102 Fed. Rep. 650; the *William Churchill*, 103 Fed. Rep. 690; the *Belgenland*, 114 U. S. 355.

The protection of sailing vessels on the high seas is a commercial necessity. Steam has become the great power on land and sea, but sea going steam freight and passenger vessels are of comparatively modern construction; and so the rules of navigation have but recently been made to meet these new conditions. One of the first international navigation rules made on these lines was that steam vessels must give the right of way to sailing vessels; not that the duty did not rest on both classes of vessels to avoid collision, but rather because steam vessels were more under the control of their navigators. They can stop, slow down, back or change their course in a short time and at will.

It is in proof in this case that the officers of the "Claudine" saw the lights of the "Carson" at 8:15 p. m., but she continued on her course right towards the "Carson" until 8:40 or 8:45 p. m., when the collision occurred. There is nothing to show that the "Claudine" ever stopped, backed, slowed down or changed her course until it was too late. The bare statement of these facts shows the steamer to have been in fault. The action of the officers of the "Claudine" cannot by any possible change of front or counter charge against the "Carson", avoid or limit the responsibility of the steamer and its owners.

It is uncontradicted that it was a full minute after the sounding of the steamer's whistle on the "Claudine", before she struck the "Carson"; that the "Claudine" sailed over 1000 feet a

minute; that she could have stopped within five hundred feet but did not do so. Even the Captain of the "Claudine" testified as hereinbefore referred to, that he "thought it was possible to stop between the sounding of the whistle and the collision." What was possible to have been done to avoid a collision should have been done, and throws upon the vessel responsible for the omission the liability for the damage resulting from the collision.

The Statute laws of the Republic of Hawaii on the subject of navigation are as severe as those of the United States, and the decisions of the Supreme Court of Hawaii are marked by a broad and enlightened advance step on this subject.

See the case of *Pacific Navigation Co. v. Allen*, 7 Hawaiian Rep. 12, and *Hind et al. v. Wilder Steamship Co.* 108 Fed. 113, where the Court especially defended "the weaklings of the sea", the sailing vessels, from being run down either by the carelessness or mistakes of steam vessels, and maintained the navigation laws in all their strictness.

The fact that there was no regular lookout on the "Claudine", and the extraordinary behavior of the second mate in leaving the deck twice, while acting as the officer thereof, and when an unknown light was approaching, seem to be in keeping with the utter lack of discipline on the steamer. This was particularly noticeable, when after the collision the second mate, McNeil, was ordered to lower a boat to save the people on the "Carson", he testified: "I went to hunt up the natives: they were here, there and everywhere, but after a while we got men enough together to man a boat."

Such an utter lack of discipline on a sea-going steamer carrying passengers, can have no excuse, and is susceptible of no apology. What if both vessels had been injured (which was a most possible thing) and both in a sinking condition, and no time was given to "hunt up" the sailors of the "Claudine"?

"Owners of vessels and especially those who own and employ steamships, whether propellers or side wheel steamers, must see to it that the master and other officers intrusted with their control and management are skilful and competent to discharge their

duties, as in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill and negligence; and this remark is just as applicable to the under officers, whether the mate or second mate, as to the Master, during all the time they have charge of the deck." *Chamberlain v. Ward*, 21 How. (U. S.) 548, 564-5.

In conclusion the Court holds that the "William Carson" was sailing a southwest course, at the time of the collision, and all the time showed her starboard side to the "Claudine;" that her lights were properly constructed and placed and were not obscured so as to be invisible to the "Claudine", but that the same were brightly burning on the night of the collision, and were visible from a point dead ahead to two points abaft the beam for a distance of two miles; that the "Claudine" did not have a look-out on the night of the collision, which fact contributed to the accident; that the second mate, while acting as officer of the deck of the "Claudine" on the night of the collision, after descrying the moving lights of the "William Carson", against all precedent twice left his post of duty and went below; that the "Claudine" did not slow down, stop or reverse or change her course in time to avoid the collision, when she could have done so; that the "Claudine" attempted to cross the bow of the "William Carson" when she was in motion and when such action would necessarily lead to a collision; that if the "Claudine" did not observe the green starboard light of the "William Carson", it was clearly the fault of the second mate acting as officer of the deck of the "Claudine"; that the "William Carson" did not contribute at all to the collision, but that the same was due to the negligence and unskilful navigation of the steamship "Claudine", for which the said steamship and her owners are liable.

Let a decree be entered in favor of J. S. Low, the libellant, for \$9050 with interest and costs from the date of the collision; and in favor of John Piltz, libellant, for the sum of \$1162.80,

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the value of the articles proven to have been lost by him, together with interest from date of collision and costs.

Nothing is allowed the libellant in the case of *Piltz v. Wilder Steamship Co., et al.*, for the personal effects proven to have belonged to his wife, as it does not appear to the Court that he was authorized to sue for or maintain an action for the same.

NOTE: Affirmed on appeal, *Wilder Steamship Co., et al., v. Low, et al.*, 112 Fed. 161.

IN THE MATTER OF THE APPLICATION OF YIM QUOCK LEONG ON BEHALF OF YIM CHUN SHAI,
for a writ of habeas corpus.

DECIDED: JANUARY 7, 1901.

1. Where a decision of the Collector of Customs is adverse to the landing of a Chinese woman claiming admission to the Territory of Hawaii on the ground that her husband is a domiciled merchant therein, this Court has no jurisdiction to hear an application for a writ of habeas corpus.
2. Where the decision of the Collector of Customs is adverse to the landing of a Chinese woman claiming admission to the Territory of Hawaii on the ground that her husband is a domiciled merchant therein, her only remedy is an appeal to the Secretary of the Treasury, from the decision of the Collector.

CHINESE EXCLUSION LAW. HABEAS CORPUS.

Application for a writ of *habeas corpus* made by Yim Quock Leong on behalf of Yim Chun Shai.

Magoon, Thompson & Peters, attorneys for petitioner.

John C. Baird, U. S. District Attorney, for E. R. Stackable, Collector of Customs at Port of Honolulu.

ESTEE. J. Yim Quock Leong, a Chinese person, petitions for a writ of *habeas corpus* on behalf of Yim Chun Shai on the ground that she is his wife and that he is a merchant and doing business in Honolulu; that she is unlawfully restrained of her

liberty; that she is a Chinese alien and until recently resided at Canton, China; that she came to this territory on the "American Maru" arriving at Honolulu on the 15th of December, 1900. The parties claim to have been married in China thirteen years ago. It is admitted that since the alleged marriage, Yim Quock Leong married a native Hawaiian woman in this Territory, who died about a year ago.

The Collector of Customs at the Port of Honolulu refused to let Yim Chun Shai land on the ground that she did not belong to the class of Chinese persons entitled to admission.

It is not necessary to consider the facts further than to observe that the petition shows that Yim Chun Shai had a hearing before the Collector of the Customs, who upon such hearing refused to allow her to land. This decision is final unless appealed from to the Secretary of the Treasury. The order of the Collector refusing to allow a Chinese person to land is not reviewable by this Court in this class of cases.

It is prescribed by the Statutes of the United States (Amendment of August 18th, 1894, Vol. 28, U. S. Stats. 390), that:

"In every case where an alien is excluded from admission to the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or Customs officer if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury."

It is admitted that Yim Chun Shai is a Chinese alien; and that she has been excluded from landing by a customs officer, who has rendered his decision adverse to her landing. The law seems to be clear that her only remedy if dissatisfied with his ruling, is an appeal to the Secretary of the Treasury.

See the case of Ching Ahoo, on *habeas corpus*, decided by this Court on October 26th, 1900¹; where it was held that this Court had no jurisdiction to review the action of the collector, and that the petitioner's remedy was an appeal to the Secretary of the Treasury.

See also, *Lem Moon Sing*, 158 U. S. 538; *In re Way Tai*, 96 Fed. Rep. 484; *Leong Youk Tong*, 90 Fed. Rep. 648.

So in the very recent case of the *United States v. Gin Fung*, 100 Fed. Rep. 389. In that case the Collector made an order refusing to land the petitioner; an application for a writ of *habeas corpus* was made to the District Court which entertained the writ and discharged the petitioner. The proceedings of the Collector were shown upon the facts adduced to have been irregular, yet the United States Circuit Court of Appeals say in reversing the decision of the District Court, notwithstanding these irregularities of the Collector at the hearing.

.....“the jurisdiction to determine the right of the petitioner to land still remained with the Collector and the Secretary of the Treasury”, citing the cases of *Nishimura Ekiu v. U. S.* 142 U. S. 651; *Lem Moon Sing*, 158 U. S. 538, *supra*.

See also *In re Lee Ping*, 104 Fed. Rep. 678.

It is however claimed by counsel for petitioner, that as the Republic of Hawaii was an independent sovereignty when the Act of Congress herein referred to was passed, and that as the whole question of the jurisdiction of the United States over this and other territories will soon be settled by a decision of the Supreme Court of the United States bearing upon the point, especially as to the effect of the Constitution and laws of the United States over the recently acquired territory including the Territory of Hawaii, that this Court should dispose of this case upon the facts presented, and not pass upon its jurisdiction at this time. But the Court is clear that whatever may be the rule in other matters, the Chinese Exclusion Laws of the United States are in force in the Territory of Hawaii, and that being so, this Court has no jurisdiction of this proceeding; and therefore orders that the writ be dismissed and the petitioner remanded into custody.

(1) Not reported.

IN THE MATTER OF THE APPLICATION OF C. C.
BITTING, for a writ of habeas corpus.

DECIDED: FEBRUARY 25, 1901.

1. The United States District Court of Hawaii possesses no power on habeas corpus to overrule the judgments of the Territorial Courts of Hawaii unless it clearly appears that the constitutional rights of the citizen are being violated.
2. Upon an application to this Court for a writ of habeas corpus on the ground that petitioner was in custody in violation of the Eighth Amendment to the Constitution of the United States, in that he was suffering "cruel and unusual punishment," where it appeared that petitioner had been sentenced to ten days' imprisonment by the Judge of the First Judicial Circuit Court of the Territory of Hawaii for contempt of court, and at the time of the application for the writ was confined in the Oahu Jail; and where it appeared that the Oahu Jail or Prison has three sections, one for persons serving terms for felonies, another for persons serving terms for misdemeanors, and the third set apart for persons held for trial or detained by the order of court; and it appearing that the petitioner was detained in the third section; and there being nothing to show that petitioner is made to suffer any other or different punishment than the other misdemeanor prisoners; *Held*, that no "cruel or unusual punishment," as contemplated by the Eighth Amendment to the Constitution of the United States, has been inflicted upon the prisoner. The writ denied.

HABEAS CORPUS.

George A. Davis and J. C. Baird, appearing for petitioner.
E. P. Dole, Attorney General of the Territory, appearing for respondent.

On the 13th day of February, A. D. 1901, C. C. Bitting presented to the Judge of this Court his verified petition, asking that a writ of *habeas corpus* issue in his behalf, claiming that he is a citizen of the United States of America residing in Honolulu, Island of Oahu, Territory of Hawaii; that he was by the Hon. A. S. Humphreys, First Judge of the First Judicial Circuit Court of the Territory of Hawaii, sentenced to be

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imprisoned for the term of ten days for contempt of Court. This was also made to appear by a *mittimus* issued out of said First Judicial Circuit Court of the Territory of Hawaii, as follows, to wit:—

“In the Circuit Court, First Circuit of the Territory of Hawaii,
“February Term, 1901.

“THE TERRITORY OF HAWAII.

“To the High Sheriff of the Territory of Hawaii, or his deputy,
“the Sheriff of the Island of Oahu or his deputy.

“C. C. Bitting having been this day adjudged guilty of contempt of Court by the use, this day, in open Court and in the presence of the Court of contemptuous and disrespectful language addressed to the Court in a rude and insolent manner in referring to certain remarks of the Court addressed to the Grand Jury, and by said Court on this day summarily sentenced therefor to be imprisoned for the term of ten (10) days.

“You are hereby ordered to take said C. C. Bitting into your custody, and cause said sentence to be executed. Hereof fail not.”

The petitioner claims he is unlawfully imprisoned in the Oahu convict prison under said *mittimus*, and that said imprisonment in the said convict prison was and is illegal and contrary to the Constitution of the United States of America, and he refers the Court to Article Eight of the Amendments to the Constitution of the United States, which reads as follows:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

The Judge of this Court thereupon ordered that a writ of *habeas corpus* issue, which writ was made returnable on the 14th day of February, A. D. 1901, at ten o'clock a. m. The writ was directed to Arthur M. Brown, High Sheriff of the Territory of Hawaii, who held the petitioner in his custody; and on the said 14th day of February, A. D. 1901, in obedience

to said writ, the said Arthur M. Brown, High Sheriff of the Territory of Hawaii, produced the petitioner in Court, and at the same time filed his return to said writ, admitting that he was the High Sheriff of the Territory of Hawaii, and that he was responsible for the imprisonment of the petitioner. He further recited, that on the 13th day of February, 1901, he received the *mittimus* from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii above referred to; and in accordance with said *mittimus* he did on the 13th day of February, 1901, conduct the said petitioner, C. C. Bitting, to the Oahu jail or prison. That the said petitioner was and is confined in the Oahu jail or prison, and not confined in the Oahu convict prison; that there are three separate and distinct portions to the Oahu jail or prison, one portion set apart for persons convicted and serving terms of sentence for felonies; another portion is set apart for persons convicted and serving terms for misdemeanors; another and third portion is set apart for persons held for trial, and persons detained by order of Court. That the petitioner was and is confined in that portion of said jail or prison set apart for the detention of persons held for trial and of persons detained by order of Court. That the facilities for caring for said petitioner were and are better in such portion of said Oahu jail or prison than they are at the police station.

It appears further, that the said petitioner is provided with better comforts and more privileges than he could have in any other prison on the Island of Oahu.

On the argument it was claimed by petitioner that his imprisonment was in violation of Article Eight of the Amendments to the Constitution of the United States, because it was "cruel and unusual" punishment. Webster defines cruelty to mean "An act which causes extreme suffering without good reason. A cruel and barbarous deed, inhuman treatment, etc., etc."

The cruel treatment complained of was that felons are imprisoned in a part of the same prison where the petitioner is detained and that this is in violation of Article Eight of the Amendments to the Constitution of the United States.

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High Sheriff Brown was sworn as a witness and the only witness for and on behalf of the petitioner, and testified that "Felons were confined in a part of Oahu Prison, separate and apart from all other prisoners and especially those persons guilty of a misdemeanor and those held under order of Court."

It was admitted by the attorney for the petitioner that he did not complain of the petitioner's treatment but he complained of the petitioner being where he is. The High Sheriff testified further that "the petitioner was given three meals a day, sleeps in the guard room on a cot with a mattress, pillow, blankets, sheets and mosquito net and is allowed the freedom of the upper portion of the Warden's quarters." The single contested fact being, is the petitioner's imprisonment in that prison "cruel and unusual?"

It is doubtless true that the Eighth Amendment to the Constitution of the United States is intended to protect the citizens against excessive bail, excessive fines and cruel punishment. The unusual punishment referred to in the Constitution must mean such punishment as is unusual because of its cruelty or unusual because of the length of the term of such imprisonment. It should be borne in mind that the conditions in the Territory of Hawaii are different from those prevailing in the States. It is not yet nine months since Congress passed the act for the government of this Territory, and there has hardly been time to provide all of the most modern prison appliances; and for this reason alone it would be most extraordinary for a United States Court in this distant land to seek technical reasons to impede the administration of public justice by hurrying to find a constitutional cause for making a general jail delivery of all convicted misdemeanants, or to look for technical grounds for overruling the judgments of the Territorial courts in a hearing on *habeas corpus*. Indeed it must be made to clearly appear to the Court that the liberty of the citizen is imperilled before it will so act. And again there are three Justices of the Territorial Supreme Court now in Honolulu, to none of whom has an application been made for relief. The petitioner therefore is not

without his remedy if this Court is in error. It was held by the Supreme Court of the United States in *Markuson v. Boucher*, 175 U. S. 184, that "We have frequently pronounced against the review by *habeas corpus* of the judgments of State Courts in criminal cases because some right under the Constitution of the United States was alleged to have been denied the person convicted." That is what the Court is asked to do in the proceedings at bar.

It is admitted that the Territorial Court had jurisdiction to find petitioner guilty of contempt, but the petitioner wants this Court to regulate the character of his punishment. That is, petitioner seeks for a different imprisonment from what other parties found guilty of misdemeanors are made to suffer. In the Marshall case decided October 23rd, 1900,¹ this Court held "that except in peculiarly urgent cases no United States Circuit or District Court will discharge a prisoner on *habeas corpus* after conviction by the Territorial Court." The Court there referred to the cases of *Pepke v. Cronan*, 155 U. S. 100; *In re Frederick*, 149 U. S. 70; *Whitten v. Tomlinson*, 160 U. S. 231-242.

It was also held in the case of *ex parte Parks*, 93 U. S. 18, that the Court would not consider whether the judgment was erroneous, because if the Court which tried the case had jurisdiction, and if the judgment and proceedings were not void, the Court would not look into the matter farther.

The judgment of the Territorial Court was that the petitioner be imprisoned ten days, and it is the duty of that Court to see its judgments properly enforced. This Court possesses no power to control the judgments of that Court unless it clearly appears the constitutional rights of the citizen are being violated. In point of fact, this case does not seem to be one where "cruel and unusual punishment is imposed upon petitioner." In any event, the judgment of the Territorial Circuit Court is presumed to be right, and what is stated in the *mittimus* must be taken as true. See *ex parte Terry*, 128 U. S. 289. This Court cannot afford a remedy upon the facts presented by attempting to overrule

the Territorial Circuit Court's decision in a proceeding on *habeas corpus*.

The case of *In re Frederick*, 149 U. S. 70, so much relied upon by the attorneys for the petitioner is not relevant, for it does not appear that the Circuit Court of the Territory of Hawaii in this case exceeded its jurisdiction. See also *In re Wood*, 140 U. S. 278. In the last above case the Court says that "while the writ of *habeas corpus* is one of the remedies for the enforcement of the right to personal freedom * * * it should be cautiously used by Federal Courts in reference to State prisoners. The writ of *habeas corpus* is not a proceeding for the correction of errors."

But under the facts in this case, the petitioner is not entitled to his discharge even if the Court took jurisdiction of this case. It should be noted there is hardly a county in the States on the mainland where felons are not kept in the common jail of the county until after their conviction or acquittal, and thus the felons must of necessity come in contact with the other prisoners detained in the same prisons. But this is a matter for the local authorities of this Territory, and unless such authorities clearly disregard the constitutional rights of the citizen or unless there appears to be a case of wanton cruelty, this Court cannot grant a remedy.

It is not claimed that petitioner is made to suffer any other or different punishment than the other misdemeanant prisoners held in this prison. He performs no labor on the streets or elsewhere. He suffers no ignominy not common to all the prisoners in his class. No objection is made to the jurisdiction of the Circuit Court.

In conclusion, the Court is compelled to believe that petitioner's punishment is neither cruel nor unusual and therefore not in conflict with Article Eight of the Amendments to the Constitution of the United States.

Let petitioner be remanded.

(1) See Ante, *In re Marshall*, P. 34.

KAMAKA KEKAUOHA v. SCHOONER ROBERT LEWERS COMPANY, sole owner of the American Schooner, Robert Lewers.

DECIDED: MARCH 27, 1901.

1. In the presence of great and unforeseen danger, no man is expected to act with deliberation.
2. Negligence need not be intentional; inattention may be, and often is, the strongest evidence of negligence.
3. Ordinary care has relation to the situation of the parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention.
4. The degree of care to be used is proportioned to the danger to be apprehended of inflicting an injury upon others.
5. Under the Hawaiian Statute (Section 1109, Ballou's Compiled Civil Laws of Hawaii, 1897), providing that the "common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage," and, as decided by the Supreme Court of Hawaii in 1846 in the case of Kake v. Horton (2 Haw. 211), the common law rule that an action would not lie for damages for the wrongful killing of a human being is rejected, and "damages in this class of cases may be assessed on the principle of compensation or reparation."
6. Under Section 1109 of the Compiled Civil Laws of Hawaii of 1897, and the decisions of the Supreme Court of the Territory of Hawaii, jurisdiction in admiralty sustained in an action *in personam* instituted by a widow to recover damages for the wrongful killing of her husband, a drayman, by reason of the breaking of a chain used in lowering a bed plate weighing some 25,000 pounds from the schooner Robert Lewers, owned by the libellee, where it was shown that the officers and men of the schooner had entire charge and control of the appliances used in the lowering of the said bed plate, and negligence was proven.
7. The husband of libellant, a drayman, while assisting in the unloading of a heavy bed plate weighing some 25,000 pounds from the schooner Robert Lewers, owned by the libellee, was killed. While the bed plate was being unloaded from the vessel, and was suspended in the air by means of a block and tackle under the exclusive control of the officers and men of the schooner, a small iron chain broke, which caused the bed plate to swing round to

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- the side of the vessel, up which the libellant's husband was endeavoring to climb in order to avoid the swinging plate, when it caught and killed him. *Held*, that his death was due to the breaking of the small iron chain, and was the result of the negligence of the officers and men of the vessel.
8. Where a five-eighths of an inch chain broke in lowering a piece of casting weighing 25,000 pounds, and no explanation is offered for the breaking of the chain, and it is in testimony that it is more dangerous to use a chain than a rope in this class of cases, *Held*, that it was the duty of the officers and men of the schooner, under the circumstances of this case, to have used the very best and strongest appliances known to the business, and it was negligence to have used any doubtful or uncertain appliances or any rope or chain of doubtful strength.
9. The unexplained breaking of the chain in this case is one of the proofs of negligence.

IN ADMIRALTY. ACTION FOR DAMAGES FOR DEATH OF HUSBAND.

T. McCants Stewart, attorney for libellant.

W. O. Smith and *A. Lewis, Jr.*, attorneys for libellee.

ESTEE, J. The libellant is Kamaka Kekauoha, the widow of Enoch Kekauoha, deceased.

The libellee is a corporation and is the owner of the American schooner "Robert Lewers."

It appears that Enoch Kekauoha, was killed on the 24th day of July, 1900, at Honolulu, by being struck with a large iron bed plate, weighing 25,000 pounds, which was being unloaded from the said schooner, and which swung against him as he was seeking a position of safety by climbing up the side of the said schooner Robert Lewers.

It further appears that deceased was one of four draymen working for Hustace & Co., of Honolulu; and that they were on the wharf to which the said vessel was tied, to load and haul away the said bed plate which had been shipped as freight on that vessel, from San Francisco to Honolulu. The Captain of the Robert Lewers and the other officers and men were engaged in removing the said bed plate from the vessel to the truck on the wharf. This was being done by ropes and blocks attached to the main and mizzen masts of the vessel with a guy line fast to

a boiler lying on the wharf; and the officers and men on the vessel had the exclusive control of the handling of the same. All the lashings and lines so employed were rope, except a short chain said to be fifteen feet in length, which broke and then the casting swung around to the side of the ship and killed the husband of the plaintiff. He, being on the inside of the swinging plate, ran to get on the deck of the vessel to avoid it, but was caught and killed before reaching there.

This action is brought by the wife of the deceased, alleging that her husband was killed by the negligence of the officers and men on the vessel.

The accident occurred within the admiralty jurisdiction of this court. The next inquiry is, will an action lie in a court of admiralty for the unlawful killing of a human being?

The English common law did not permit such actions, but in 1846, the English Parliament passed an Act known as Lord Campbell's Law, which practically repealed the old common law rule in such cases provided. The Hawaiian Islands had never fully adopted the English common law as their law. *Thurston v. Allen*, 8 Haw. 392; the *King v. Robertson*, 6 Haw. 718, 725; *Kake v. Horton*, 2 Haw. 209, 222; *Awa v. Horner*, 5 Haw. 543.

On this point, the case of *Kake v. Horton* is especially in point, where the Supreme Court of this territory laid down the broad and enlightened rule "that damages in this class of cases may be assessed on the principle of compensation or reparation." That is now the law of the territory.

The Court further said in that case, "we are not fettered by the English common law; no legislative enactment is required to remove that obstacle to the maintenance of an action like the present one in an Hawaiian court, and we think it ought to be permitted as being consonant with rational law and reason."

Sections 1215, 1232 and 1234 of the Civil Laws of Hawaii, which are referred to by counsel for libellants, merely point out how actions like the one at bar can be brought. The statute

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assumes that the right of action exists, but it seems that it nowhere in words declares that it does exist. But, as the Supreme Court of the Territory has held that it did exist, and in common right the unlawful killing of a human being should give to the surviving widow an action against the guilty party, this Court will be largely controlled in this matter by that opinion.

It also seems to be the settled law that in damage suits like the one before us, an action may be brought in the Territory for damages *in personam* in admiralty for the unlawful killing of a human being. And more particularly since the Supreme Court of the Territory has decided the case of *Kake v. Horton*, 2 Haw. 211, which is on all fours with the one under consideration.

I note among the authorities referred to by counsel for libellee, that of *Insurance Co. v. Brame*, 95 U. S. 754. This is not in point, because that was an action brought by a life insurance company on account of the unlawful killing of a person insured by it, and not an heir or relative. It finally did hold, however, that "no action lay for the killing" which is not the law of this territory.

The next case referred to is *The Harrisburg*, 119 U. S. 199. This was an action *in rem*. In that case the Court decided what is not now contradicted, namely: that at common law no civil action lies for an injury which results in death. But today, as we have seen, there is no common law of England remaining on this subject. The common law was abrogated by Lord Campbell's Act in 1846; and in any event this territory only adopted the common law when not in conflict with the decisions of its courts. See 1109 Civil Laws. The English common law was not the source of our system of laws in these islands.

Even on the mainland, there has been a wide divergence of opinion on this subject. For instance, in *Cutting v. Seabury*, 1 Sprague 522, it is held that "the weight of authority in the

common law courts seem to be against this action but natural equity and the general principles of law are in favor of it."

And as we are making new rules for this territory, we had better commence right by holding that the Courts have jurisdiction in this class of cases, for in this territory we are not bound by the old common law rule. It is to be hoped we will follow, in this class of cases, a higher plane of equity and justice. Mr. Chief Justice Chase said in the *Sea Gull*, Fed. case, No. 12,578, that:—

"It better becomes the humane and liberal character of proceedings in admiralty, to give than to withhold the remedy, when not required to withhold it by established and 'inflexible rules' "

The eminent Chief Justice then referred to several states which had followed the common law rule, but adds, that "in other states the English precedent has not been followed."

So it was held in the *Clatsop Chief*, 8 Fed. Rep. 163, Judge Deady, that "it has been seriously doubted whether the rule of the common law that a cause of action for an injury to the person dies with the person is also the rule of the maritime law. There is some authority for the proposition that it does not, and that in admiralty a suit for damages in such a case survives." And authorities there cited.

The learned Judge there adds, "I see no valid reason whythe admiralty courts in the exercise of their jurisdiction *in personam* over maritime torts, should not recognize and enforce the right so given."

See also the opinion of Judge Brown in the case of *The Garland*, 5 Fed. Rep. 924, where he says the common law rule is not consonant with either "reason or justice;" and concurs with the views expressed by Judge Deady in the case of *Holmes v. O. & C. Ry. Co.*, 5 Fed. Rep. 75.

It was also held in *The E. B. Ward, Jr.*, 17 Fed. Rep. 456, "that now the admiralty courts are permitted to estimate the damages which a particular person has sustained by the wrongful killing of another, and enforce an adequate remedy."

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See also *The Columbia*, 27 Fed. Rep. 704, where Judge Brown said: "I hold in this case as seems to me most consonant with natural justice and equity, that the admiralty court has jurisdiction."

It seems that the most enlightened jurists of modern times hold that actions of this sort brought *in personam*, should be sustained upon "the principle of natural equity and common right," and since 1846 that has been the law of England.

Indeed it requires but a limited amount of state or territorial authority to authorize the bringing and maintaining of an action in admiralty *in personam* for the unlawful killing of a human being, because that is a natural right. Common justice demands it. But to maintain an action *in rem* against a vessel and its apparel and tackle, and thus to maintain a lien on property, there must be a clear legislative authority.

But it would be going backward in the line of civilization to adopt the rule that a cause of action dies with the person unlawfully killed. We have observed that England has by Act of Parliament arrested the evil complained of, and now one man cannot illegally kill another man and deprive a family of the husband's support and yet suffer no legal responsibility therefor. If this were so, it would bring down to us the barbarism of the Middle Ages with none of its chivalry.

And again the Civil Laws of Hawaii, 1897, prescribe (Section 1109): "The common law of England as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or Laws or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage....."

We have already shown that another rule was fixed by the Hawaiian judicial precedent in this territory. See decision in 2 Haw. 211. But beyond that, there is no common law of England extant on this subject at this time. The common law rule as to this class of actions was repealed in 1846. See 9th and 10th Victoria, "C." 93. The common law of England is

the *lex non scripta* of that kingdom, consisting of their immemorial usages, legal maxims and customs of the country, but when Parliament interferes and passes an act on the same subject it thereby destroys the common law rule in relation to the matter involved in the enactment. In this case, Parliament repealed the old common law rule by enacting a law which prescribed among other things, that the previous common law of England was to the effect that "no action at law was maintainable against a person who by his wrongful act may have caused the death of another person," but Parliament went on to say that: "Be it therefore enacted that whosoever the death of a person shall be caused by the wrongful act, neglect or default of another.....the representative of the party injured may maintain an action and recover damages in respect thereof.....and that such action may be maintained notwithstanding the death of the person injured;" thus clearly changing the common law rule, for this Act of Parliament has become the law of England.

It may be noted that England has taken a long step in advance of some of the courts of our own country on the question of holding the party responsible who wrongfully causes the death of another person. The old rule so much relied upon by the technical law learning of our country, no longer exists either here or in England, so far as the common law is concerned. 1 Blackstone Com. 89; *Tiffany on Death by Wrongful Act*, Page 210; *Sutherland on Statutory Construction*, Sec 142.

It is fortunate indeed that in these matters, the courts of Hawaii never were "fettered by the common law." This was and is an enlightened and a civilized community. It early became the duty of the highest courts in the Kingdom of Hawaii to decide the case of *Kake v. Horton*, according to natural right and justice, and it did so under circumstances of peculiar interest. That decision remained the law of the Kingdom and now is the law of the Territory of Hawaii. It is over forty years since that decision was first rendered. It would ill become this or any other court, except for some potent reason, which reason

must be founded in natural justice, to overrule so well considered and so long established a rule of action as the one decided in *Kake v. Horton*.

The question now presented is, were the officers and men on the Robert Lewers guilty of negligence resulting in the death of the deceased? A duty was due the deceased by the Captain and officers and men of the ship Robert Lewers. No man has any more right to kill another from negligence than from an assault. If the defendant was guilty of negligence it mattered not whether the libellees knew of the defect in the chain or not. *Cunu v. Boston Music Hall*, 135 Mass. 414; *Hayes v. Philadelphia*, 150 Mass. 457.

A knowledge of a man's duty is presumed, and so there are no degrees to negligence. Cooley, in his work on Torts, at page 661, says that: "Often the injury itself affords sufficient *prima facie* evidence of negligence."

The point in this case is, was there such a disregard of duty as will hold the defendant responsible for damages? It is admitted the deceased was killed by being struck by an iron bed plate weighing 25,000 pounds and that the accident occurred by reason of the breaking of a chain, while that casting was being landed from the vessel named; that the casting thereby swung round against the side of the ship, and killed the deceased as he was climbing up the side of the vessel to get away from it.

The officers and men of the ship had exclusive control of the bed plate that was being loaded. They furnished the rope and the chain for the guy and lashings; they were in command of the situation; they were delivering the freight and it was their duty to deliver it to the consignee in a suitable and proper manner.

It seems that for the purpose of showing how the accident occurred, libellee brought into court a part of the chain that broke. It did not produce the part broken off nor the broken link or broken ring or broken hook forming the chain thus broken. It was defendant's chain and presumably in its possession, and the whole ought to have been produced in court.

It would then have been easy to observe whether there was a latent defect in the iron that caused the break, or whether it was a clean break of solid iron. If the broken link had been produced, this could have been made apparent. This is a most unfortunate circumstance.

The Court is not at all convinced that a reasonable man, under the circumstances of this case, would have believed that an old $\frac{5}{8}$ of an inch chain was strong enough to hold and safely handle the vast weight of that casting; at all events it proved not strong enough to do that, and the fact that the chain broke, and thus caused the death of the deceased, is one of the evidences of neglect.

The chain certainly did not look strong enough for the purpose. It is in testimony that a chain is more dangerous for such use than a rope, and the Court holds that it was the duty of the officers and men of that ship when unloading a piece of machinery weighing 25,000 pounds, to have used the very best and strongest appliances known to that business, and it was negligence to have used any doubtful or uncertain appliances, or any rope or chain of doubtful strength; and that in this case the unexplained breaking of the chain is one of the proofs of negligence. *Caldwell v. New Jersey Straw Co.*, 47 N. Y. 282. See also the recent case of *Stewart v. Ferguson*, 164 N. Y. 553; where a scaffold provided by the master for a servant's use falls, and no other cause of the fall was ascertained except as inferred from the fall itself, the fall was held to be "*prima facie* evidence of the negligence of the master" in an action by the servant to recover damages received in consequence thereof.

See also *Esbery Cigar Co. v. Portland*, 35 Oregon 282; *Garland v. Aurin*, 103 Tenn. 555.

It is in evidence that when a chain has been long in use, the iron becomes brittle and weak. This was an old appearing chain. The only question seems to be, did it look strong enough at the time, and were the officers of the ship honestly deceived by its looks?

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The Court is compelled to believe that the weight of the testimony shows negligence on the part of the officers and men on that ship. The draymen were not trespassers by being where they were; they went after freight and they had the right to expect due care should be exercised by the officer and men of the ship in delivering it to them. The old rule that every man must lookout for himself no longer prevails; it is the duty of the officers on ship board to protect life in handling their freight. The officers of a ship hold positions of trust and they are required to exercise ordinary care in handling all freight.

In fact every common carrier of freight as well as passengers must so conduct himself as not to imperil the life or limb of those whose duty it is to come in contact with him.

The chain in this case broke, and the breaking of that chain was the cause of the death of the deceased. It is proven by at least two witnesses, that a chain is not the proper article to use in handling and landing great weights like this casting. See the cross examination of Captain J. F. Haglund, page 148 Testimony, who said: "we prefer rope because we can't always rely on a chain." He was defendant's witness, and the fact that "we can't rely always on a chain," shows negligence in the use of it.

No officer or man employed on the ship when this man was killed, was produced as a witness at the trial; there were some scientific experts who were not present at the accident, but who testified that the chain was strong enough, although it broke; and the broken part was not produced by defendants or seen by these witnesses; yet they seemed positive in their oft repeated assertions that a chain $\frac{5}{8}$ of an inch in size was strong enough, because as stated by them all, chain is tested at the factory when made. Yet none of them knew where this chain was made or whether tested or how long it had been used.

The Court is compelled to disregard this testimony and especially the statement made by these experts that such a chain had twice the tensile strength of a straight bar of iron of the same size.

It was also argued to the Court that the deceased contributed to his own death, because when the chain broke, he was in a dangerous position and ran the wrong way to avoid an injury; that is to say, that the deceased, when he with others was moving the dray so that the bed plate would rest squarely on it as it came down, should have anticipated that the chain would break and thus avoid any position whereby he would be hurt if the chain broke and that he should have ran another way when it did break.

In the presence of great and unforeseen danger, no man is expected to act with deliberation.

It is prescribed by Section 5344 of the Revised Statutes of the United States, "That every Captain or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to duty, the life of any person is destroyed, shall be guilty etc., etc."

This is the rule in criminal cases; *United States v. Holtzhauer*, 40 Fed. 76, but it shows most clearly how careful the Congress of the United States is of the life and health of citizens.

It is not necessary in this class of cases that there should be any intentional wrong. Inadvertence is one of the chief elements of negligence; inattention may be and often is the strongest evidence of negligence. *Am. & Eng. Ency. of Law*, Vol. 16, 396.

The Courts have held that ordinary care has relation to the situation of the parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention.

Fletcher v. Boston, 1 Allen 15; *Penn. R. R. Co. v. Ogier*, 35 Penn. State, 60; *Am. & Eng. Ency. of Law*, Vol. 16, 401 and note; *Morgan v. Cox*, 22 Mo. 373; *Cooley on Torts*, p. 662; *Milwaukee v. Arms*, 91 U. S. 489-494.

The degree of care to be used is proportioned to the danger to be apprehended of inflicting an injury on others; in this case the danger was great, because the weight of the casting was

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enormous and greater care was thus required. *Frink v. St. Louis*, 75 Mo. 595.

Ordinary care must be proportionate to the probability of injury. *Morgan v. Cox*, 22 Mo. 373; *Cooley on Torts*, 662; *Milwaukee v. Arms*, 91 U. S. 489-494.

Ordinary care is a question of fact in each case. *Griffin v. Auburn*, 58 N. H. 121; *Kinney v. Hannibal*, 80 Mo. 573; *Penn. Co. v. Franna*, 112 Ill. 398; *Ohio v. Calloren*, 73 Ind. 261; *Penn. v. Coon*, 111 Pa. St. 430; *Philadelphia v. Spearan*, 47 Pa. St. 300-5.

The Court finds for plaintiff. No damage is allowed for injured feelings. At the time of the death of deceased, he was receiving from \$7.00 to \$12.00 a week, of which it is assumed one-half of the smaller sum, or \$3.50 a week, went to his wife. He was twenty-five years old when he was killed, and according to the testimony of Mr. Hutchins, the average term of life is 38 years, making a probable future term of deceased's life, thirteen years. Thirteen years of 52 weeks each, would be 676 weeks. At \$3.50 per week, that would amount to \$2366.00. The plaintiff seems to be a strong healthy woman, and ought to be able to help herself some, at least one-third of her living, which would amount to \$788.88. Deduct that from \$2366, which would leave \$1577.12, for which amount and costs, let judgment be entered. ,

NOTE: Affirmed on appeal, see *Schooner Robert Leuers v. Kekauoha*, 114 Fed. 849.

WILLIAM C. ACHI *v.* THE KAPIOLANI ESTATE,
LIMITED.

DECIDED: APRIL 24, 1901.

1. The Territorial Stamp Act, passed by the Legislature of the Kingdom of Hawaii in 1876, and now known as Chapter 64 of the Civil Laws of Hawaii (1897), was not repealed by the Act of Congress passed for the government of the Territory of Hawaii, and its provisions are now in full force and effect.

2. The Organic Act passed by Congress for the government of a territory, and under which the territorial government is organized, must be taken as the fundamental law of the territory; and all territorial legislative assemblies derive their force and validity from such Organic Acts.
3. A territorial legislature has the power to levy taxes for all legal purposes and upon property subject to taxation within its jurisdiction.
4. The presumption of law is always in favor of the constitutionality of a statute, and whenever a court entertains a reasonable doubt concerning its constitutionality, it must be resolved in favor of the statute.
5. Chapter 64 of the Civil Laws of Hawaii, 1897, relates to taxation for local and municipal purposes only, and its provisions are not contrary to Subdivision 1, Section 8, of Article 1 of the Constitution of the United States.
6. The provisions of Subdivision 1, Section 8, of Article 1 of the Constitution of the United States, that all taxation "shall be uniform throughout the United States," relates solely to taxation for national purposes, and has no reference to local or municipal taxation in states or territories.
7. A bill was filed to compel the defendant to specifically perform a contract to deliver a good and lawful deed to complainant of certain property, by affixing thereto the stamps required by the provisions of Chapter 64 of the Civil Laws of Hawaii (1897), which defendant had refused to do. Upon demurrer filed to said bill on the ground that the same did not state facts sufficient to constitute a cause of action against defendant, in that the said Chapter 64 was contrary to the Constitution of the United States, the same was overruled, and defendant given ten days in which to answer.

ON DEMURRER TO BILL FOR SPECIFIC PERFORMANCE.

Peterson & Matteuman, for petitioner.

Kinney, Ballou & McClanahan, for defendant.

This is an action brought for the specific performance of a contract for the purchase and sale of certain real estate described in the complaint, which is valued at \$300,000, and it is alleged that the Respondent was to deliver to Complainant, a good, sufficient and lawful deed; that on the contrary, Respondent tendered to the Complainant a deed which was not good, sufficient or lawful in that it does not comply with the terms of Chapter 64 of the Civil Laws of the Territory of Hawaii in this,

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that it does not bear the territorial stamps required by the provisions of said law.

That Respondent has been often requested by Complainant to affix to the said deed, the stamps required by the said Civil Laws of the Territory of Hawaii, to render the said deed good, sufficient and lawful, but that defendant refused, alleging that under the Constitution and laws of the United States of America, it is not obliged so to do.

Defendant served and filed a demurrer to the complaint, alleging "That the said bill of complaint does not state facts sufficient to constitute a cause of action in this, that the Constitution and laws of the United States do not require the said defendant to affix to the said deed any further or other stamps than those already affixed, being the stamps prescribed by the laws of the United States."

The demurrer in this case raises the single point as to the constitutionality of the law of the Territory of Hawaii imposing stamp duties on conveyances of real property.

This territorial stamp act, now known as Chapter 64 of the Civil Laws of Hawaii (1897), was passed under the Hawaiian monarchial government in 1876, and long prior to annexation, and it has remained in force through the whole period of the Hawaiian Republic, and was continued in force by the Enabling Act passed by Congress. (See Secs. 5, 6 and 7 of said Act.) But it is argued by the parties demurring to this complaint, that the territorial stamp act is unconstitutional because it violates subdivision 1, section 8 of Article 1 of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." That this stamp tax is not uniform throughout the United States and hence unconstitutional. That by Section 5 of the Act to provide for a government for the Territory of Hawaii, it is prescribed, "That the Constitution

and except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said territory, as elsewhere in the United States;" while Section 6 of the same Act prescribes, "that the laws of Hawaii, not inconsistent with the Constitution or laws of the United States or the provisions of this Act, shall continue in force. * * * * *

Counsel claims that this territorial stamp law is inconsistent with the Constitution and laws of the United States, and therefore not continued in force.

It is argued by defendant that the Constitution of the United States, is by special enactment extended over the Territory of Hawaii, and that the same rule of taxation under the Constitution, prevails in the Territory of Hawaii as exists in the several states of the Union, namely, that all taxation must be equal and uniform.

And 2nd. That under this stamp law, taxation would not be equal and uniform, because the same law is not in force in the states forming the American Union, as is in force in the Territory of Hawaii, and therefore the constitutional rights of defendant are invaded, and

3rd. That defendant's constitutional rights are further invaded, because after paying the stamp tax provided by the laws of the United States, and which the people of the States pay, the defendant is compelled to pay a large territorial stamp tax on the same instruments already stamped under the laws of the United States, and thus the citizens of Hawaii are burthened with a system of local taxation which the Constitution of the United States prohibits. These are substantially the points made by defendant.

Admitting this to be true, the answer seems to be that the right of taxation for municipal and local purposes is unquestioned in the states and territories, unless such local taxation oversteps the restraints which the Constitution of the United States, or the laws of Congress throw as a shield around the property rights of the people.

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There is no doubt that the provision in the national Constitution which says that all taxation shall be equal and uniform, relates solely to taxation for national purposes and taxation between the states. It has no reference to local or municipal taxation in states or territories. It is needless to submit that taxation is necessary in all organized communities, whether territorial or state.

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It is true that in the territories all taxation must be authorized by Act of Congress or by a necessary implication flowing from some Act of Congress.

It may be admitted the Territory of Hawaii possesses only such powers as Congress has granted to it; unlike a state, this territory is not sovereign, unless Congress endows it with sovereignty: yet having been organized by Act of Congress as a territory of the United States, it is by that Act alone given the right to govern.

The territory must maintain itself; it can only do that by some method of taxation.

As was said by Attorney General Griggs in his brief filed in the case of *Goetze v. United States* and other cases recently argued by him in the Supreme Court, and referring to *Knowlton v. Moore*, 178 U. S. 41, which is a ruling authority in this case, "uniformity as to taxation historically meant to protect the states against inequality imposed upon each other * * *" "There was not any reason why that should apply to the territories," said the Attorney General; "they were to be governed by the discretion of Congress," page 131 of brief.

It is doubtless true the Constitution reaches its broad and protecting aegis over this land, and over this people, but except in rare instances, the Constitution is not appealed to in local and police matters.

The police powers of this territory like the police powers of the states, reaches all local and incidental matters of moment.

It is doubtless true that the Congress of the United States is the only sovereign power now presiding over the destinies of Hawaii, and while a territory, the people of Hawaii possess no

power to tax themselves, even for themselves, unless that power is granted to them by Congress, or is derived by necessary implication, or is incidental to its territorial enabling act.

The question then arises, has Congress given to the people of Hawaii the right of local taxation.

It will be seen that by the terms of Sections 5, 6 and 7 of an Act of Congress to provide a government for the Territory of Hawaii, approved April 30, 1900, all laws of Hawaii which are repealed by that Act are so repealed by reference; those not so referred to as repealed are continued in force. This Stamp Act is continued in force and is the law of the Territory today. It was doubtless deemed by Congress to be a fair system of taxation for local purposes, and because some local taxation was necessary to maintain the territorial government which Congress had created, it was continued in force.

It has been seen that Congress has a clear right, under the Constitution, to govern the territories, and the right of taxation is one of the highest attributes of government, and a necessary incident to this right. *Murphy v. Ramsey*, 114 U. S. 15, 44; *Boyd v. Nebraska ex rel Thayer*, 143 U. S. 135, 169.

It was held in the last above case, that "it is too late at this day to question the plenary power of Congress over the territories," and the power to govern carries with it the responsibility of governing well.

It is doubtless true that the personal and civil rights of the inhabitants of this territory are secured by the Constitution of the United States, and that taxation is not one of the burthens the people of this territory can avoid.

When Hawaii was annexed, it was with the implied understanding that the people of this territory, could and would under the direction of Congress govern themselves, and as it was then a Republic, it was supposed to be capable of self-government.

So the United States annexed the land and the people, and the people who were citizens of the territory, became citizens of the United States and are such citizens now. It was held in

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Shively v. Bowly, 152 U. S. 1, 48, "that by the Constitution, * * * the United States having rightfully acquired the territories, and being the only government which can impose laws upon them have the entire dominion and sovereignty, national and municipal, Federal and State, over all the territories, so long as they remain in a territorial condition."

See also, *American Insurance Co., et al., v. Canter*, 1 Peters, 511-542; *Benner v. Porter*, 9 Howard, U. S. 235-242; *Cross et al., v. Harrison*, 16 Howard, 164-193; *National Bank v. Yankton*, 101 U. S. 129-133; *Shively v. Bowly*, 152 U. S. 1, 48.

The Organic Act passed for a territory and under which a territorial government is organized, must be taken as the fundamental law of that territory, and all territorial legislative assemblies derive their force and validity from such Organic Acts. See *National Bank v. Yankton Co.*, 101 U. S. 129, 133; *Ferris v. Higley*, 20 Wall, U. S. 375, 380.

This stamp Act having been continued in force by Congress, it is the law of this territory unless it violates the Constitution of the United States. In this connection it should be said that "All restrictions upon the powers of territorial legislatures must be found in the Organic Laws creating the territory, or in the Acts of Congress supplemental thereto." See *Spies v. Illinois*, 123 U. S. 131; *United States Revised Statutes* Sec. 1851; *Ferris v. Higley*, 20 Wall, U. S. 375.

In the past Congress has been very careful as to taxation in the territories. For instance: The property of non-residents of a territory cannot be taxed higher than the lands or property of residents. See *Revised Statutes*, Sec. 1851.

So the right of suffrage in the territories is conferred by Congress on all citizens of the United States, thus securing to the people all the rights of American citizenship. See *United States Revised Statutes*, Sec. 1860.

It has long been the admitted law of our country that a territorial legislature has the power to levy taxes for all legal pur-

poses and upon property subject to taxation within its jurisdiction.

The question then presented is, is this taxation for a legal purpose? Every presumption is in favor of that proposition until the contrary is made to appear.

The usual argument that the Constitution follows the flag finds but a faint echo in this case; but it may be said that in some things the Constitution does follow the flag, but not to the extent claimed. There are certain personal rights made secure to all American citizens by the Constitution of the United States wherever the citizen may be, which rights have a personal and not a territorial application: among these rights are, that no bill of attainder, or *ex post facto* law shall be passed; that no American citizen shall be deprived of his property except by due process of law; that his life and liberty are both made secure in the territories and in the states alike; that religious liberty is guaranteed to all men; that neither slavery nor involuntary servitude shall exist anywhere in the United States; that the writ of *habeas corpus* is a writ of right which follows the man wherever he may be on American soil. These are some of the great American principles which go with the flag, and abide with the citizen. It requires no Act of Congress to give additional force to these matters. No legislation, local or national, can violate any one of these sacred principles. They are the immovable mile-stones of American liberty—the great and never failing shield of American citizenship.

But notwithstanding these and other exceptions, all laws, state, territorial and national, are presumed to be constitutional until the contrary appears and Courts hesitate before declaring any law unconstitutional. They never do this unless compelled to do so, and most rarely laws affecting the revenues, because local government cannot exist without revenue.

This Stamp Act seems to be within the taxing power of the Territory of Hawaii. The presumption of law is always in favor of the constitutionality of a statute, and whenever a court entertains a reasonable doubt concerning the constitutionality of a

statute, that doubt must be resolved in favor of the statute. See *Rex v. Young Tang*, 7 Haw. 49, 60 and 61; *People v. Hayne*, 83 Cal. 111; *State v. Moore*; 104 N. C. 714; *Nicol v. Ames*, 173 U. S. 509; *Burlington, Etc., Railway v. Dey*, 31 Am. St. Rep. 477; 82 Iowa, 312; *Stevenson v. Colgan* 91 Cal. 649; *Wadsworth v. Union Pacific Ry. Co.*, 18 Colo. 600; *In re Madeira Irrigation District* 92 Cal. 296; *Conlin v. Board of Supervisors*, 99 Cal. 17; *State v. Roby et al.*, 142 Ind. 168; *State v. Bargus*, 53 Ohio St. 94; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 55 Am. St. Rep. 149; 22 Col. 513; *State v. Tibbitts*, 52 Neb. 228; *People v. Simon*, 176 Ill. 165; *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372; *Austin v. State*, 101 Tenn. 563.

This tax was not levied as in *Loughborough v. Blake*, 5 Wheat. (U. S.). 317, cited by counsel for defendant. The taxes there referred to comprehend taxes for national purposes only.

So too the case of *Stoutenburgh v. Hennick*, 129 U. S. 141, also referred to by counsel, is not analogous; because in that case Congress had not given the District of Columbia the authority to levy the tax complained of. Mr. Chief Justice Fuller said in the beginning of his opinion in that case:

"It is a cardinal principle of our system of government that local affairs shall be managed by local authorities". . . but "in the matter of interstate commerce, the United States are but one country and are and must be subject to one system of regulations." And the tax was there declared illegal because it violated interstate commerce which is controlled by Congress.

But in this case the facts are that when the territorial act of Congress was passed, which went into effect on the 14th of June, 1900, the territorial stamp act of Hawaii so-called, was already in force and the revenue thus derived was for local purposes. Hawaii was then a nation with all the governmental machinery of an independent state. It had a large number of public officers whose duties were fixed by law, and a vast amount of expenses were being incurred which was recognized by Congress.

None of the money received from the Territorial Stamp Act formed a part of the national revenue.

To recapitulate: Congress created this territory; gave it a name; provided for territorial and national Courts; repealed or continued in force the civil and criminal laws then in force in the territory; provided for public officers, and continued the laws which fixed their duties, and prescribed their compensation; created a territorial legislature and established its powers, and the duties of its members; authorized the creation of territorial indebtedness and provided for its payment; in a word, established civil government here. Finally by Sec. 91 of the Enabling Act, prescribed "That all public property ceded to the United States by the Republic of Hawaii, under the Joint Resolution of Annexation, approved July 7th, 1898, shall be and remain in the possession of the Government of the Territory of Hawaii, and shall be maintained, managed and cared for by it, at its own expense until otherwise provided for by Congress * * * * " "And all revenues and other property acquired by the Republic of Hawaii since said cession, shall be and remain the property of the Territory of Hawaii." Thus while in name this is a territory, yet in many of its governmental attributes it has all the powers of a state. There is no limit placed upon its taxing power, except as to the accumulation of debts. It is given full authority to maintain the public peace, and to provide for the common defense, and even the most unusual authority of suspending the writ of habeas corpus and controlling the military of the United States is allowed. See Sec. 67 of the "Act to Provide a Government for the Territory of Hawaii."

After such far-reaching powers are conferred, this Court will not make haste to find constitutional objections to the laws of this territory. As has been said, all laws are presumed to be constitutional, and that presumption must be overcome by an unquestioned weight of authority, before this Court will judicially determine that a territorial revenue law is unconstitutional, and therefore void.

There is an added reason in the fact that we are remote from the home government; that this territory must rely on its own resources to maintain itself; that an appeal to the Supreme Court of the United States requires much time and expense; and further, it would materially affect the revenue to interfere with this law.

In a case where the personal or property rights of the citizen are under the Constitution clearly involved or imperilled, this Court, in common with all other courts of our country, will go to the fullest extent to vindicate the rights of the citizen.

But this Stamp Act was passed by the Hawaiian Legislature at the session of 1876, and so it has been in force many years. In 1891, the Supreme Court of the then Kingdom of Hawaii, in the case of the *Hilo Sugar Co. v. Mioshi*, 8 Hawaiian, 201, 211, sustained the law, and again *In the Matter of the Appeal of the Hawaiian Tramways Co.* 9 Hawaiian 281, the same law was considered and sustained; and still again in "*In the Matter of the Appeal of the Hawaiian Commercial Co., etc.*", 10 Hawaiian, 514, the law was further sustained. This was as late as 1896. Several legislatures have been in session since then, and it has not been repealed. And therefore, except for most abundant reasons, this Court will not now declare it void on the ground that it is unconstitutional.

There is nothing in the Constitution of the United States which prohibits within the states or territories, where Congress has granted the right, any reasonable taxation for local purposes. In most of the states and territories there are local road and school taxes levied and collected often by townships and always to maintain local government. These have rarely, if ever, been attacked on constitutional grounds, and yet the rate of taxation in different localities in the same counties differs as the necessities of the people differ. The right of representation and taxation are among the grandest achievements of our fathers, which achievements resulted in the bringing near to the people who were taxed, the power to control the right and amount of such taxation, and in all local matters, this power

has never been doubted by any considerable number of Americans.

The people who live here, who pay the taxes and who expend the money after collection, know best what is needed. It is contrary to the spirit of our institutions to go five thousand miles to find out what form of taxation is best suited to this enlightened community, when the general power of taxation is granted by Congress, and this Court will not, in cases of doubtful constitutional authority, over-ride a co-ordinate branch of the government.

The Court holds that the territorial stamp act referred to, is constitutional.

Let the demurrer be overruled, the defendant to have ten days to answer.

ROBERT R. HIND v. BRIGANTINE "CONSUELO," her
tackle, apparel, etc.

DECIDED: MAY 22, 1901.

1. Where it appeared that while the sailing vessel "Consuelo" was moored in the roadstead of Mahukona, on the island of Hawaii, a "kona," or southwesterly storm arose during the night of the 14th of November, 1901, and about two o'clock in the morning one of the owners of the vessel on shore sent out some natives in a boat "to see if the 'Consuelo' needed anything;" whereupon the Captain of the "Consuelo," with his mate, steward and crew including every man aboard, left the vessel and went ashore with the natives in the boat which had been sent out, some life preservers being in the boat and some of the men carrying bundles; and where it appeared further that this part owner, while the Captain of the vessel was ashore, telephoned to libellant, as the owner of the steamer "Upolu," to send the "Upolu" "to tow out the 'Consuelo' as she had a very valuable cargo on board, and we hate to lose it," and the "Upolu" reached there about 9 o'clock and fastened her lines to the "Consuelo" and towed her out, it nowhere appearing that any agreement had been made in relation to payment for the services to be rendered by the "Upolu;"

Held, that the services rendered by the "Upolu" were in the nature of salvage, as the "Consuelo" was in danger of slipping her moor-

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ings, going upon the shore, or being swamped in the heavy seas, when the "Upolu" took her in hand and put her in a position of safety. The "Consuelo" was of the value of \$6,000, and her cargo was valued at about the same amount; salvage awarded in the sum of \$750.

2. The fact that the "Consuelo" suffered no damage is not material. If she were in danger of loss or deterioration at the time the services were rendered, then it is a case for the award of salvage.

IN ADMIRALTY. LIBEL *in rem* FOR SALVAGE.

Paul Neumann, Proctor for Libellant.

Robertson & Wilder, Proctors for *E. A. Fraser*, intervening for the interest of himself, *Charles Nelson* and *J. Renton*, co-owners of the "Consuelo."

ESTEE, J. This is a libel for salvage brought by Robert R. Hind, libellant, owner of the steamer "Upolu," whereof Frank Dalton is master. It is brought for himself as well as for the master and crew of the steamer "Upolu," against the brigantine "Consuelo" her tackle, apparel, furniture, boats and appurtenances, whereof one A. G. Page is master, and against all persons intervening for their interests therein. Libellant asks salvage in the sum of \$3,000. *E. A. Fraser* answers the said libel, intervening on behalf of himself, *C. A. Nelson* and *J. Renton*, as co-owners of the said "Consuelo."

The matter was referred to *W. J. Robinson*, as special referee, to take testimony and report the same to this Court.

Salvage is defined to be services rendered in the rescue or relief of property at sea in imminent peril of loss or deterioration.

A salvor is one who, without any particular relation to a vessel in distress, proffers useful service and gives it as a voluntary adventurer. He may act with or without request. So assistance needed and rendered under such circumstances is in the nature of salvage services.

The facts appear to be these:

That the "Consuelo," a sailing vessel, Captain A. G. Page commanding, was on a trip from San Francisco to Mahukona, on the Island of Hawaii. She reached the roadstead of Mahukona

about October 25th, 1900, but owing to the fact that other vessels were lying in, could not get a mooring until the evening of the 14th of November, when at about ten o'clock of that night she was moored about a quarter of a mile from the shore.

During the night the wind blew heavily from the southwest toward the land, the barometer fell and a storm known as a "kona," common to these islands, prevailed during the entire night. That about two o'clock in the morning, Mr. Fraser, one of the owners of the "Consuelo," and consignee of her cargo, being on the shore, arose and aroused some of his men and ordered them to go out and go aboard of the "Consuelo" and find out if she needed anything. That they did so, and reported to the captain of the "Consuelo," who with his mate, steward and crew, including every man aboard of the "Consuelo," left the ship and went ashore in the boat with the natives sent out by Mr. Fraser, leaving the "Consuelo" entirely alone.

There is some conflict as to how long they stayed ashore, but it is in evidence that the captain, with his officers and men, remained ashore from a little after four o'clock until after six, when the captain returned alone with the native crew which he claimed to have obtained on shore, in the same boat. It is not contradicted that some life preservers were taken in the open boat when it left the "Consuelo" first, thus tending to show that the officers and men of the "Consuelo" thought there might be need of them, and that the mate and one of the crew took bundles with them to the shore, probably their clothes. It does not appear that the captain ordered his men to remain on the vessel, or that he desired to remain on her himself. No explanation is offered by either the captain or anyone else for the conduct of the crew in leaving; there is no testimony as to a mutiny or any dissatisfaction among the men aboard of her. The captain saying in explanation only: "I couldn't prevent it—they would go. They got in the shore boat and I went in order to get another crew for the vessel." But when ready to sail his old crew went with him on board his ship.

It was certainly most extraordinary conduct on the part of the officers and men of the vessel to desert the ship without cause, and especially as not one of these officers or men, with the exception of the captain and the cook, were called as witnesses to explain this proceeding. It would appear that the action of the crew in deserting the vessel in this manner in company with the captain must have been due to some cause which they now do not admit, and from an examination of all the testimony in relation to the storm that was prevailing, and the position of the "Consuelo," the Court must assume that it was fear of the danger in which the vessel was then in that induced this wholesale desertion. This seems to be more apparent from the testimony of the witnesses for the libellee to the effect that when the "Upolu" hove in sight, the recreant crew consented to go back at once upon the vessel.

It further appears that Mr. Frazer, one of the owners and the consignee of the "Consuelo," and intervenor herein, telephoned to Mr. Hind, the owner of the "Upolu," then lying at Alaalae, some twelve or fifteen miles from Mahukona, to send the "Upolu." There seems to be some disagreement between Mr. Frazer and Mr. Hind as to what the object was in having the "Upolu" sent around to Mahukona.

Mr. Fraser testified he telephoned to Mr. Hind and asked him where the "Upolu" was. "I told him," says Mr. Fraser, "that the 'Consuelo' was lying in port with a southerly wind and that there was a possibility that the captain might want to tow out, and I asked him to send the 'Upolu' down and lie there; and in case the captain wanted a tow he could give him the tow."

While Mr. Hind testified: "He (Mr. Fraser) telephoned to me to send the 'Upolu' around to Mahukona to tow the 'Consuelo' out of port, which she afterwards did. I said I would go down and find a boat, and he said, 'I wish you would, as the 'Consuelo' has a very valuable cargo and we hate to lose it.' "

There does not seem to the Court to have been but one object in getting the "Upolu" at Mahukona, and that was to as-

sist the "Consuelo" out to sea because of the very serious gale that was then blowing in the port of Mahukona and the threatening danger to the "Consuelo" if she remained there. At any rate the "Upolu" left Alaalae about seven o'clock A. M. and reached Mahukona about nine o'clock or a little after. When she reached there she blew her whistle two separate times, but received no response from the "Consuelo" and no one appeared upon the deck of that vessel, no one was aboard of her; and as the "Upolu" was in danger of being entangled in the hawsers that connected the "Consuelo" with the buoys, the "Upolu" was about to turn around and go back when her captain saw a boat leave the shore with some men in her. The testimony of the captain of the "Consuelo" at this point is of interest. He says: "I thought it was strange to see the 'Upolu' coming along at that time, and I asked one of the native crew where the 'Upolu' was going. He said, 'I think she is going to tow you out;' "and so," said the captain of the "Consuelo," "we all went ashore again so that we could pick up my crew and get them back on board, which I did. When I went ashore I asked Mr. Fraser if he had made any agreement with the 'Upolu' to tow me out. This was before the 'Upolu' got there, although in sight. He said 'no,' and I asked him if I would make any arrangement. He said, 'no, leave that to us.' " The captain further testifies: "I went back, put my crew aboard of the 'Consuelo,' and I then spoke the captain of the 'Upolu,' and I asked him if he could tow us out, and he said he could if I set my fore and aft sails, my lower top-sails and stay-sails when we got started. That was all the conversation. I did not make any arrangement with him to do this because I supposed the owners, Mr. Fraser and Mr. Renton, took the matter out of my hands and ordered the boat unbeknown to me."

It seems hardly credible that the captain of the "Consuelo" was unaware of the ordering of the "Upolu" to Mahukona in view of the fact that Captain Page was ashore when Mr. Fraser

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was telephoning to Mr. Hind early in the morning, and that a storm was then prevailing.

It seems that the captain of the "Consuelo" and his crew assisted in getting a line on board of the "Upolu" and she towed the "Consuelo" out to sea, the actual time consumed in this towage being some three-quarters of an hour, although some of the witness for libellee testified that it took but fifteen minutes.

There is some conflict in the testimony as to whether there was any danger to the "Consuelo" at the time the services were rendered by the "Upolu;" and whether if so, the danger was such as to entitle the "Upolu" to salvage compensation. It is clear to the Court from the testimony as a whole, that there can not be any doubt as to the dangerous position in which the "Consuelo" was lying and that her captain and the owners of the vessel thought she was in danger, and that all parties, including the sailors, were conscious of it. Else why did the captain and crew leave the ship? The sailors did not go back to the ship until after the "Upolu" was sighted as appears from the evidence of both the captain and the cook of the "Consuelo." If the "Consuelo" were not in danger, why did Mr. Fraser, the owner or co-owner of the vessel, early on the morning of the 15th of November, telephone to the owner of the "Upolu" to have her sent around to the port of Mahukona, and why were Mr. Frazer and his men up at two o'clock in the morning, the latter going out to the "Consuelo," "to see if she wanted anything," and then returning to the shore with all her officers and men aboard, leaving the ship entirely alone?

If it had been possible for the captain of the "Consuelo" to have set sail and gone out of port safely, without the assistance of the "Upolu" as he now testifies, why did he not do this and not abandon his ship in the first place, and then returning ask the captain of the "Upolu" "can you tow us out?" And why after being towed out, did he remain away from the port of Mahukona until the weather moderated and was again fair? If

the place was safe and the weather such as to permit him to remain there, why did he not do so?

The real facts are there was a severe south wind blowing and the "Consuelo" was in danger of slipping her moorings, going upon the shore or being swamped in the sea. This must have been the fear that took possession of the captain and the crew when they deserted the ship. It is the common instinct of the captain of a ship to remain on her deck, and no rational explanation has been given of this desertion of the vessel.

It is clear to the Court that the services of the "Upolu" were necessary in order to take the "Consuelo" out to sea, as appears especially from the testimony of Captain Campbell, a witness for the libellee, and a man of large experience in these waters, who when asked whether a vessel could sail out from this particular spot moored as was the "Consuelo," and the wind blowing as it was blowing on that morning, testified: "She might possibly if there was not a very heavy sea on; she would have what they call a 'nip and tuck' to get out."

It is clear to the Court that the case is one where salvage compensation should be awarded. This seems to be admitted by libellee, who tendered to libellant one hundred and ten dollars when the regular towage rate as testified to is forty dollars. In this case the services of the "Upolu" were not only requested by the owner, but were of value in saving the "Consuelo," which vessel was valued at about six thousand dollars and her cargo at about the same amount.

The fact that the "Consuelo" suffered no damage is not material. If she were in danger of loss or deterioration or damage at the time the services were rendered, then it is a case for salvage. Yet the services of the "Upolu" were not of such a character as to entitle her to large compensation, although her position among the lines of the "Consuelo" placed her in danger of having her propeller caught and being cast ashore. In a sea of the character described and a storm of the nature testified to, this danger was enhanced. The Court in view of all these circumstances, is of the opinion that the "Upolu" is

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entitled to salvage and fixes the amount at the sum of seven hundred and fifty dollars, to be distributed as follows:

To Frank Dalton, Captain of the "Upolu," fifty dollars; to A. Gomes, Chief Engineer thereof, and to James Davis, Assistant Engineer, twenty-five dollars each; to the five sailors constituting the crew and cook, fifty dollars, being ten dollars each; and the balance of six hundred dollars to the libellant, Robert R. Hind, with costs.

Let judgment be entered accordingly.

UNITED STATES v. KUT YONG.

DECIDED: JULY 22, 1901.

1. In a proceeding to deport a Chinese person found in the Territory of Hawaii without the certificate of residence required by the Act of Congress of May 5, 1892 (as amended by the Act of Congress of November 3, 1893), and the Act of Congress of April 30, 1900, providing a government for the Territory of Hawaii, the burden of proof is on said Chinese person to prove her right to remain.
2. The policy of the law of the United States in relation to Chinese is the exclusion of all save the few privileged classes.
3. The wife partakes of the husband's status as a laborer.
4. In a proceeding to deport a Chinese woman found in the Territory of Hawaii without the certificate of residence required by the Act of Congress of May 5, 1892 (as amended by the Act of Congress of November 3, 1893), and the Act of Congress of April 30, 1900, providing a government for the Territory of Hawaii;
Held, that in order to entitle said Chinese woman to remain, she must show to the satisfaction of the court either that she was born in the Hawaiian Islands, and therefore an American citizen under the provisions of the aforesaid Act of Congress of April 30, 1900; or is the wife of a Chinese merchant domiciled in the Territory; or that she is the wife of an American citizen.
5. Unless the Court is fully satisfied of the truth of Chinese testimony, the presumption is that a Chinese person coming from China and seeking to land in this country is an alien, and not a native born citizen; following *In re Jew Wong Loy*, 91 Fed. 243.
6. Where a Chinese is acting as manager of, and who worked on, a rice plantation belonging to an unincorporated company, in which he claims an interest, but which company had no articles of incorporation or

articles of copartnership in which his name appeared as a partner, *Held*, that under the most favorable construction to be placed upon his occupation, he is nothing but an employe of the company, and is therefore not within the merchant class, but is a laborer.

CHINESE EXCLUSION LAW. PROCEEDING TO DEPORT.

J. J. Dunne, Acting U. S. District Attorney, for plaintiff.

T. McCants Stewart, for defendant.

ESTEE, J. This is a proceeding for the deportation of Kut Yong, a Chinese woman, arrested on the complaint of E. R. Hendry, a Deputy Marshal of the United States for the District of Hawaii, for being a Chinese laborer within the limits of the United States, and within the limits of the District of Hawaii, without the certificate of residence required by the Act of Congress, approved May 5th, 1892, and the Act of Congress approved November 3d, 1893, amendatory thereof, and the Act of Congress approved April 30th, 1900, providing a government for the Territory of Hawaii.

The defendant sets up as a defense to this proceeding, a legal right to remain in the Territory on the grounds, first, that she was born in the Hawaiian Islands on the 2nd day of October, 1881, her father, one Mau Quon, being a naturalized citizen of Hawaii; and second, that she was legally married in China to one Tin Yee, a merchant, residing and doing business in the Territory of Hawaii. The matter was heard by the Court.

The defense in this proceeding is an attempt to cover every ground which could tend to show a reason for the defendant being here and her right to remain.

If she were born in the Hawaiian Islands as claimed, although of Chinese parentage, yet she would be an American citizen and entitled to remain. See Constitution of the Republic of Hawaii, Section 1, Art. 17; Section 4 of an Act of Congress approved April 30th, 1900, for the government of the Territory of Hawaii; *In re Wong Kim Ark*, 71 Fed. Rep. 382; *In re*

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Look Tin Sing, 21 Fed. Rep. 905; *Gee Fook Sing v. U. S.*
C. C. A. 49 Fed. Rep. 146.

If she were proven the wife of Tin Yee, and he were a domiciled Chinese merchant, she would be equally entitled as such wife to remain.

But are such contentions borne out by the testimony in this case? I think not. The burden of proof is on the defendant.

It is prescribed by the Statute of the United States, that:

"Any Chinese person or person of Chinese descent arrested under the provisions of this Act, or the Acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States."

Section 3 Act of May 5th, 1892, Vol. 27, Stats. U. S. 25; *In re Sing Lee et al.*, 54 Fed. Rep. 334; *U. S. v. Wong Dep Ken*, 57 Fed Rep. 206; *U. S. v. Hing Quong Choi*, 53 Fed. Rep. 233; *Li Sing v. U. S.*, 180 U. S. 486.

The witnesses called by the defendant to identify her as being a former Chinese child now known as Kut Yong and as having been born in these Islands, who left here for China when she was a child and returned here on the steamer "Doric" on the — day of June last, are all Chinese, and with the exception of possibly one, Hoy Sung, are all related to the defendant. Their testimony as to the date of her birth at Palama, Honolulu, on the Island of Oahu, and her age when she left here for China is conflicting. Ahin, the uncle, who manifests throughout the proceeding a deep interest in this woman and who brought her here from China and is the leading spirit in the attempt to keep her here, testifies that he is the brother of Kut Yong's father, who is dead; "that he cannot remember exactly when she, Kut Yong, was born, but that she is now twenty-one years of age;" Chu Quong, who also claims to have been a brother of the young woman's father, says, "she was born some time in October, 1881," which would leave her lacking one year and several months of being twenty-one.

And again as to the age of the child when she left for China, there is a discrepancy in the testimony of all the witnesses who should know. Ahin fixes her present age at twenty-one years and testifies that it was sixteen years since she left for China; Chu Quong says she was about five or six years old when she left, but was born in October, 1881; while the alleged aunt, Sui Shee, the wife of Ahin, fixes the age when she left, first at "two or three years;" then at "four or five years" and finally at "three or four years;" while Kut Yong herself says she does not remember of ever living in the Hawaiian Islands, she was too young. If this is true, she must have left here at an extremely early age, earlier than is testified to by any of the witnesses, for surely a child of from five to six years old would remember something and especially of the fact of her leaving one country in a ship and going to another.

There is nothing clear or definite either as to the birth of a child known as Kut Yong in Palama at the time and under the circumstances testified to, and certainly nothing which is satisfactory as proving to the Court that even if such a child had been born in the islands under such circumstances, the defendant is such child grown to womanhood. So too the reasons given for the identification of this young woman are absolutely unconvincing and in their detail extraordinary. Ahin gives as his reason for knowing her after the lapse of so many years, "because she is my relative." The other alleged uncle, Chu Quon, "because I worked in the same place with her father," and Yong Wa Soy, still another alleged uncle, "because I saw her in China; because she is my brother's daughter."

Tin Yee says he played with her as a child in Palama, and knew her by her appearance; while Kut Yong says, "the first time I know this man was when he was in China, before he married me I did not know about him at all."

The facts are evident that defendant is a Chinese woman. In speech and dress and mode of living she is thoroughly Chinese. While asserting a claim of birth in these islands and a marriage with Tin Yee, a man who cannot speak English, but who

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also claims to be a native of these islands, she still says she "calls China her home."

There are five witnesses who testify as to her birth in these islands, but in an uncertain, indecisive and contradictory manner. All five of these witnesses are Chinese, and are all related to the defendant and interested in the issue of this proceeding.

It has been held that unless the Court is fully satisfied of the truth of the testimony of Chinese witnesses, its finding should follow the presumption that a Chinese person coming from China, and seeking to land in this country is an alien, and not a native born citizen of this country. *In re Jui Wong Loy*, 91 Fed. 240, 243.

It has also been held many times that long absence in China (as in this case) is highly prejudicial to the claim of the applicant for re-entry.

Gee Fook Sing v. U. S., 49 Fed Rep. 146; *Lee Sing Far v. U. S.*, 94 Fed. Rep. 834; *In re Louie You*, 97 Fed. Rep. 580; *In re Lan Sam*, decided by this Court in Aug., 1900. (1)

Counsel for defendant claims that as the evidence upon the question of the birth of this woman in these islands is uncontradicted, that therefore it should be believed. It is a well known principle of law often adjudicated that evidence to be believed must not only proceed from the mouth of a credible witness, but must be such as to be credible in itself, such as the common experience and observation of mankind can approve as proper under all the circumstances. The manner of the witness, the improbability of his story, his incapacity to recollect the transactions testified to, his sympathy or bias in favor of the person for whom he is called, his interest in the result of the cause, his relations with and friendship for the defendant, the entire situation under which he testifies, all this may justify the Court in wholly rejecting his testimony even in cases where he may not be attacked in his reputation or contradicted by other witnesses.

See *Blankman v. Vallejo*, 15 Cal. 638; *McFadden v. Wallace*, 38 Id. 51; *Sonoma v. Stofen*, 125 Id. 32; *Lasher v. Colton*, 80 Ill. App. 75; *French v. Milliard*, 2 Ohio St. 44; *Ellwood v. Tel. Co.*, 45 N. Y. 549; *Daggers v. Van Dyke*, 37 N. J. Eq. 130; *Tracey v. Town of Phelps*, 22 Fed. Rep. 634; *In re Jew Wong Loy*, 91 Id. 240; *In re Louie You*, 97 Id. 580; *Lee Sing Far v. U. S.*, 94 Id. 834, 836-7; *Quock Ting v. U. S.*, 140 U. S. 417.

The Court therefore holds that the presumption in this case is that the defendant is an alien and not a native born American, and that such presumption has not been overcome by the testimony adduced in her behalf.

The second claim of defendant to remain, namely that she is the wife of a domiciled merchant, is two fold: in that it is necessary for her to prove affirmatively that the alleged husband, Tin Yee, is a merchant in the sense used in the Statute, and second, that she is his wife.

The term "merchant" as used in the "Chinese Exclusion Laws," is defined to be:

"A person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his own name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

See Sec. 2, Act of Congress of Nov. 3, 1893, Vol. 28, U. S. Stats. Page 7.

Tin Yee nowhere establishes in the testimony given in this proceeding that he was a merchant. On the contrary, the testimony clearly shows that he acted as manager of the rice plantation of the Sun Wo Hing Co., and as he testified, "worked on its plantation and took charge of its business."

It is true that it is in testimony that he had an interest in the Hop Sink Co., but this rests upon the mere assertion of the Chinese witnesses, who testified that neither this company nor the Sun Wo Sing Co., in which it is also claimed Tin Yee had

an interest, is incorporated, or had articles of co-partnership in which the name of Tin Yee appeared as a partner, or in fact any articles of co-partnership *U. S. v. Loo Way*, 68 Fed. 475, 478.

The parties interested in the Sun Wo Sing Co. are engaged in raising and selling rice, "not in selling goods," said Ahin; "only raising rice, that is all." And he adds, "they do not make a business of buying and selling other goods," and it is for this company that Tin Yee acts as manager. In the Hop Sink Company, he simply claims an interest.

It is clear that any man may have an interest in a company or corporation and yet be pursuing the vocation of a laborer. In the recent case of *U. S. v. Yong Yew*, 83 Fed. 832, a person whose "occupation" was that of a laundryman, but who had a "\$1000 interest" in a Chinese grocery store and business, was held to be a "laborer" and not a "merchant," and so liable to deportation.

Tin Yee, upon the most favorable construction to be placed upon his occupation, is nothing but an employe of the Sun Wo Sing Co., which is engaged in operating a rice mill and rice plantations, and he is therefore not within the merchant class, but is a laborer.

The policy of the law in reference to Chinese is one of exclusion of all but the few privileged classes, and the decisions of the Courts follow strictly this policy. To quote the Attorney General of the United States:

"It may be stated comprehensively that the result of the whole body of these laws and decisions thereon is to determine that the true theory is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. This view is recognized by the general name under which the laws are known; the Chinese Exclusion Acts."

22 Opinions of the Attorney General, 132.

The classes of Chinese mentioned in our treaty with China who are expressly allowed to enter without the certificates re-

quired by the Acts of Congress, are "teachers, students, merchants, or travelers for curiosity." (Art. 11, Treaty of Nov. 17th, 1880.).

If Tin Yee, the alleged husband, is not a merchant but a laborer, the defendant would be debarred from re-entering, or remaining, if already in, as his wife under the circumstances in this case.

The wife partakes of her husband's status as a laborer and as such is debarred from admission by law. (*Opinion Solicitor of the Treasury*, Feb. 7, 1896.)

It was held in the case of *U. S v. Mrs. Gue Lim*, 176 U. S. 459, that "when the fact is established to the satisfaction of the authorities that the person claiming to enter either as the wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate."

The defendant does not come within one of those classes. But Tin Yee claims birth in these islands, and that as the wife of an American citizen, Kut Yong should be permitted to remain. Conceding that if he had been born here his wife would be entitled to remain, there yet remains the marriage to be proven. This has not been done.

All the evidence in relation to the so-called marriage of Tin Yee and the defendant is a tissue of contradictions and suspicious circumstances. The date of the marriage is uncertain and vague; even the chief parties in interest differing as to the time. Hoy Sun, a particular friend of Tin Yee, testified that he went to China with him "two years ago, and was there when he was married;" while Tin Yee himself says he was married four years ago. The defendant says it is over three years ago since she was married.

Tin Yee says after marrying his wife he lived with her seven months; she says he lived with her five months when he returned to the Hawaiian Islands, leaving her in China. Ahin, the alleged uncle, brought the woman here on the

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"Doric" when he returned to the islands after a visit to China. He took charge of her and paid her fare. The husband, Tin Yee, testified he did not know the amount it cost to bring his wife here. The lack of interest displayed by the alleged husband in the welfare of his wife seems to be equalled only by the wife's apathy in regard to him, as she said she preferred to live in her uncle's house rather than with her husband.

Indeed there is nothing in the evidence which tends to convince the Court of the truth of this marriage, or that the woman is the wife of Tin Yee. I am therefore of the opinion that she is not his wife and shall so hold.

As to the exclusion of Chinese, this Territory has now neither a law nor an exclusion policy of its own. The laws of Congress prevail. And while it is true the United States has always welcomed foreigners to its shores, yet the foreigners so welcomed have always been those who assimilated with and became a part of our people.

This nation has never favored the immigration of people who will not make citizens. It is American citizenship and not laborers for America which our laws most encourage; but Chinese are a very inferior material out of which to make American citizens. A man to be a good American citizen must be capable of studying our laws, speaking our language and adopting our customs. The United States, in common with many other nations, have taken long steps towards keeping Chinese laborers out of our country. And to that end the treaties with China, the statutes of the United States passed in conformity to those treaties, and the decisions of the Courts are a unit against the admission of Chinese laborers, and this action by this nation is prompted by the highest principles of self-preservation.

Having failed to prove her birth in these islands or her marriage to a domiciled Chinese merchant therein or to an American citizen, to the satisfaction of the Court, it is the judgment of the Court that Kut Yong is unlawfully within the United States and the District of Hawaii, and is hereby remanded to

the custody of the Marshal with directions to deport her to the country from whence she came.

(1) *In re Lan Sam. Ante, P, 6.*

UNITED STATES OF AMERICA *v.* KAM YOU.

DECIDED: JULY 26, 1901.

1. The fact that a marriage ceremony according to American or Christian customs is performed after the arrival of a Chinese woman in United States territory does not alter her status so far as her right to enter the country is concerned under the Chinese Exclusion Laws; her status when she reached the Islands is the status which the Court must alone take into consideration in deciding upon her right to remain.
2. General trend of decisions upon question of evidence of birth in the United States of persons of Chinese descent is stringent.
3. Long absence in China of person of Chinese descent claiming to have been born in the United States is prejudicial to right to re-enter.
4. Where a claim of marriage is made, the woman, Kam You, being in China and the alleged husband in the Hawaiian Islands at the time of the performance of the alleged ceremony according to Chinese custom, *Held*, that it was impossible for the necessary ceremonies of a Chinese marriage of the character indicated to be completed until the alleged bride had reached the home of the bridegroom under the Chinese customs; and where a year elapsed before the bride attempted to join her alleged husband, the marriage is in an inchoate and incomplete condition, and was not completed before the entrance of the woman into the Territory of Hawaii.

CHINESE EXCLUSION LAW. PROCEEDING TO DEPORT.

J. J. Dunne, Acting District Attorney for plaintiff.
Thomas Fitch, Attorney for defendant.

ESTEE J. This is a proceeding for the deportation of one Kam You, a Chinese woman arrested by E. R. Hendry, a Deputy United States Marshal for the District of Hawaii, for being a Chinese laborer and now within the limits of the United States and of the District of Hawaii, without the certificate of

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residence required by the Act of Congress of May 5th, 1892, and the Act of November 3rd, 1893, amendatory thereof, and the Act of Congress approved April 30th, 1900, providing a government for the Territory of Hawaii.

The defendant sets up as a defense to the deportation proceedings, a right to remain in the Territory upon a claim that she is a citizen of the United States having been born in Honolulu on the Island of Oahu, in the year 1888, of parents then residing in Hawaii; that she left Hawaii and went to China with her mother in 1895, leaving her father here working on a sugar plantation where he now is. And second, a claim that she was married in China in the month of April, 1900, according to Chinese custom, to Yong Hang, the said Yong Hang being at the time of said marriage, and for nine years prior thereto, and ever since a contractor, merchant and manager residing in Hawaii; that one year after said marriage said Kam You came to Honolulu to join her husband, arriving here on the steamer "Doric" in June, 1901.

The matter was heard by the Court.

The claim of defendant in this case is two fold. First, that she is a native of the Islands, and second, that she is the wife of a domiciled merchant one Yong Hang, by virtue of a marriage "according to Chinese custom" in China, while the husband Yong Hang was living in Hawaii.

Pending the trial, the United States Marshal allowed Kam You, the defendant, to remain at the house of Y. Ahin, a Chinese merchant, together with certain other Chinese awaiting deportation proceedings, there being no accommodations at the territorial jail. And while this was irregular, yet it afforded no excuse for the action of the attorney for the defendant, who having access to her as such attorney, secured a marriage license and a local minister to perform the ceremony of marriage according to American law, between this defendant and the man Yong Hang, to whom she claimed to have been already married in China, and by reason of which marriage in addition to her claim of birth, she based her right to enter and remain here.

This woman was in the custody of the Court. Her attorney was an officer of this Court, and as such obliged to see that there was no trifling with public justice or with the due administration of the law, and however great his solicitude for the cause of his client, his conduct in thus attempting to defeat the administration of the law, was wholly unprecedented and reprehensible to a degree and for which there can be no excuse.

There does not seem to be any necessity for the Court to go over again the statutes and decisions relative to cases of this character. This proceeding is on all fours with the case of the *United States v. Kut Yong*, decided July 22nd, 1901, (1) by this Court, and wherein the law is fully referred to upon the leading points involved herein.

It is impossible for a rational mind to believe the testimony upon the point of the birth of the defendant in these Islands. Kam You swears in her answer that she was born in Honolulu in 1888; that she left Honolulu for China with her mother in 1895, leaving her father in the Islands, and who still remains here according to the testimony. She would then have been about seven years of age, and twelve years old when the alleged marriage occurred in 1900. She alleges further that she came here one year after the Chinese marriage to join her husband, namely on the steamer "Doric" in June, 1901, which would leave her just thirteen years of age.

Yet on the trial, she swears she was born in Honolulu and does not remember the year, but that she is twenty-three years of age now. By what process of reasoning she arrives at this conclusion, or how this is to be reconciled with the sworn allegations of her answer is not clear.

She further testifies that although she was six years of age when she left Honolulu, she remembers nothing of Honolulu or of any one living here, but that she knows China is her home.

And again while she sets up in her answer that she is the daughter of one Chuck See, now in the Islands, and as appears from the testimony, at present on the Island of Maui, yet the

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said alleged father was not produced to identify the woman as his daughter or to offer what would seem to be the strongest evidence that could be adduced to prove her birth, namely, that of a parent.

The general trend of the decisions upon the question of evidence of birth of persons of Chinese descent in the United States, is stringent, and as was stated in the decision in the Kut Yong case hereinabove referred to, "long absence in China is highly prejudicial to the claim of the applicant for re-entry." (*Gee Fook Sing v. U. S.*, 49 Fed. 146; *In re Louie You*, 97 Fed. Rep. 580).

The circumstances attending the alleged Chinese marriage of this defendant and Yong Hang, he being in the Hawaiian Islands and she in China at the date of the marriage, as testified to in this case, are unusual and not in conformity with the customs attending a Chinese marriage. There is no proof as to what those customs are, but according to a very interesting article found in the Encyclopaedia Britannica, Vol. 5, Page 670, it appears that Chinese marriages are solemnized as follows:

"The bridegroom prepares two large cards on which are written the particulars of the engagement * * * one of which is sent to the lady. Following the exchange of cards, presents of more or less value according to the wealth of the parties pass between the households, and at last when the happy day arrives, the bride surrounded by her friends, starts from her father's house in a sedan chair for her future home * *

* Half way between the two houses she is met by a party of the bridegroom's followers, who escort her the rest of the way.

* * * On alighting from her sedan chair, she is led with her head covered into the room where her future husband awaits her. Without exchanging a word, they sit down side by side, and each tries to sit on a part of the dress of the other, it being considered that the one who succeeds in so doing, will rule in the household. * * * They then adjourn to the reception hall where stands the family altar, and where they

worship Heaven and Earth and their ancestors. This done, they drink a glass of wine together, when for the first time, the bridegroom is allowed to see the face of his bride. Here the marriage ceremony ends."

Conceding that in this case all of the preliminaries have been gone through with (it being in evidence that the parties were married "according to Chinese custom,") yet as Yong Hang was here, and the woman in China, it was impossible for the necessary ceremonies of a marriage of this character to be completed, until the alleged bride had reached the home of the bridegroom. In this instance, fully a year elapsed before the bride attempted to join her so-called husband. Until she did join him and complete the marriage ceremonies, the marriage remained in an incomplete, and inchoate state, even "according to the Chinese custom."

Such was its condition when the defendant Kam You reached Honolulu. It is evident the attorney for the defendant realized this fact and tacitly admits it by his conduct in having a new ceremony performed here between the parties according to American law.

But the status of the woman when she reached Honolulu is the status which the Court must take into consideration in deciding this case. She came into the country under the fraudulent allegation that she was the wife of a domiciled Chinese merchant.

The Court therefore is of opinion that even if the testimony relative to the Chinese marriage is to be believed, yet such marriage is incomplete, the contracting parties at the time living in different jurisdictions and the marriage never consummated before the woman's entrance into this Territory.

The defendant was therefore not the wife of Yong Hang when she reached United States territory, and any subsequent marriage cannot be a factor in deciding this case.

In view of the conclusion of the Court upon the two other questions involved in this proceeding, it would not seem necessary to pass upon the status of the man Yong Hang; but the

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evidence seems to be clear that the said Yong Hang does not come within the provisions of the term "merchant" as defined in the Statute (Act of November 3rd, 1893, U. S. Stats. Vol. 28, page 7) as being a "person engaged in purchasing and selling merchandise, etc." The testimony is uncontradicted that he is simply a journeyman painter, and as such a common Chinese laborer. Were the Court to have entertained a different opinion upon the question of the marriage of these parties and have held Kam You to have been the wife of Yong Hang, she would yet partake of his status as a laborer and as such would be debarred from entering the territory, and being in under the circumstances of this case, would be unlawfully here. (*In re Ah Moy*, Vol. 21 Fed. Rep. Page 785).

It is therefore the opinion of the Court and it so holds, that not having proven her birth in these Islands, or her marriage to a domiciled Chinese merchant herein, the defendant, Kam You, is unlawfully within the United States and the District of Hawaii, and is hereby remanded to the custody of the United States Marshal, with instructions to deport her to the country from whence she came.

(1) See *U. S. v. Kut Yong*, *Ante P*—.

UNITED STATES OF AMERICA *v.* CHING TAI SAI.

UNITED STATES OF AMERICA *v.* CHING TAI SUN.

DECIDED: AUGUST 13, 1901.

1. The framers of Article 17, Section 1, of the Constitution of the Republic of Hawaii and of the Act of Congress providing a government for the Territory of Hawaii (Section 4 thereof), approved April 30, 1900, intended to refer to the geographical limits of the Hawaiian Islands rather than to any political conditions existing therein; and that Hawaiian and American citizenship was to be extended to all persons born in the Islands, excepting only those "born of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence by a fiction of public law is regarded as part of their own country."

2. The fact that two Chinese persons were born in the Hawaiian Islands while the same was a monarchy known as the Kingdom of Hawaii, does not deprive them of their status as American citizens, it being proven that they were born in the Hawaiian Islands, sons of a domiciled Chinese laborer, in view of the provisions of Article 17, Section 1, of the Constitution of the Republic of Hawaii, "that all persons born or naturalized in the Islands and subject to the jurisdiction thereof, are citizens of the Republic;" and of the provisions of Section 4 of the Act of Congress, approved April 30, 1900, to "provide a government for the Territory of Hawaii," that "all persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

CHINESE EXCLUSION LAW. PROCEEDING TO DEPORT.

J. J. Dunne, Acting U. S. District Attorney for government.

Lyle A. Dickey, attorney for defendant in both cases.

ESTEE J. This is a proceeding for the deportation of Ching Tai Sai and Ching Tai Sun, two Chinese persons arrested upon complaint of E. R. Hendry, a Deputy United States Marshal for the District of Hawaii, on the ground that they were Chinese laborers within the limits of the United States and also of the District of Hawaii, without the certificates of residence required by the Act of Congress approved May 5th, 1892, and the Act of November 3rd, 1893, amendatory thereof, and the Act of Congress approved April 30th, 1900, providing a government for the Territory of Hawaii.

Both defendants answered claiming to have been born in the Hawaiian Islands and each to be an American citizen. By stipulation between the attorneys it was agreed that both cases should be heard and decided together.

It was shown on the hearing that these defendants were Chinese boys of the age respectively of eighteen and twenty years. It is admitted that they were born in the Hawaiian Islands of Chinese parents when the government of the Islands was a constitutional monarchy, their father being a Chinese laborer and a citizen of China; that when the boys had reached

the age of eight and ten years respectively, the father took his family, including these boys, to China, where he left them, returning to the Islands himself one year thereafter.

The boys remained in China for ten years, coming back on or about July 9th of this year on the steamer "Peru."

During the ten years absence of the defendants from the Islands, several governmental changes took place here. The monarchy first gave way to a provisional government ultimately resulting in the Republic of Hawaii and finally in the annexation of the Islands by the United States as a Territory, which occurred on July 7th, 1898, by reason of the "Newlands Resolution of Annexation" so called, 30 Stat. U. S. 750.

The question was raised upon the argument that as these boys were born under the government of the Kingdom of Hawaii, and not under that of the Republic of Hawaii, which was the existing government when the Islands were annexed, and had left the Islands and were living in China when these Islands became a Republic and afterwards a Territory of the United States, that they were not included in those who were admitted to be citizens of the United States by the Act of Congress, approved April 30th, 1900.

In the Act of April 30th, 1900, (Vol. 31 U. S. Stats. Page 141) entitled an "Act to provide a government for the Territory of Hawaii," it is prescribed by Section 4 thereof, relating to the question of the American citizenship of the people of the Islands:

"That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

The question then presented and the main question, (conceding the birth of these boys in the Hawaiian Islands at the time stated) is, "who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight?"

In this connection, it will be necessary to review a little of the history of the annexation proceedings of this Territory.

On July 7th, 1898, the Congress of the United States passed a joint resolution (Volume 30 U. S. Stats. Page 750) whereby the Islands were annexed as a part of the territory of the United States and became subject to the sovereign dominion thereof, although the actual and formal cession of the sovereignty was not made until August 12th, 1898, when the Hon. Sanford B. Dole, the President of the then Republic of Hawaii, formally turned the same over to the Hon. Harold M. Sewall, representing the government of the United States, and the United States flag was raised over the dome of the Executive Building.

When the cession was made, the government of the Hawaiian Islands was a Republic with a written constitution, which constitution prescribed who were citizens of that Republic, that is to say:

Article 17, Section 1 of that Constitution provided:

"That all persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the republic, are citizens thereof."

This provision of the Constitution of Hawaii controls as to who constituted its citizens. The only question being as to the construction of the clause "subject to the jurisdiction thereof."

In arriving at an interpretation of the above section of the Constitution of the Republic of Hawaii we are aided by the construction given to the Constitution of the United States which has a provision in almost the exact terms of that of the Constitution of Hawaii, namely—the Fourteenth Amendment thereof which provides:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States"

While the question as to whether a child born in the United States of foreign parents is or is not an American citizen has never been directly decided by the Supreme Court of the United States, (1) yet it has been decided by the Courts of the

Ninth Circuit, and notably in the case of "*In re Look Tin Sing*," reported in 21 Fed Rep. 905, where Judge Field, then a justice of the Supreme Court of the United States, sitting with Judge Sawyer, a Circuit, and Judge Hoffman, a District Judge of that Circuit, says, in construing the Fourteenth Amendment above quoted,—

"They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws and within the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned (subject to the jurisdiction thereof) except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors whose residence by a fiction of public law is regarded as part of their own country. * * * The language used has also a more extended purpose. It was designed to except from citizenship persons who, though born or naturalized in the United States have renounced their allegiance to our government and thus dissolved their political connection with this country."

In the case of *Gee Fook Sing*, reported in 49 Fed. Rep. Page 146, the Circuit Court of Appeals for the District of Oregon, also passed upon the question of the construction of the Fourteenth Amendment to the Constitution of the United States, wherein the Court (Deady, J.) says—

"That inasmuch as the 14th amendment to the Constitution of the United States declares that all persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, the laws excluding emigrants who are Chinese laborers are inapplicable to a person born in the country and subject to the jurisdiction of its government even though his parents are not

citizens nor entitled to become citizens under the laws providing for the naturalization of aliens."

And see also to the same effect the decision of Judge Morrow, a Circuit Judge of this Circuit, in the case of *In re Wong Kim Ark*, reported in 71 Fed. Rep. 382.

It would, however, not seem necessary to go beyond the decisions of the Supreme Court of the Republic of Hawaii, as to the construction of this provision of its constitution. It has been decided by that Court in the case of a child born of British parents in the Hawaiian Islands when the government of the Islands was that of a monarchy, and whose parents were British subjects, and the birth of which child had been registered at the British Consulate, that such child was subject to the jurisdiction of the country and was an Hawaiian subject and citizen. *In the Matter of the Application of George Macfarlane for a Writ of Mandamus*, Vol. 11, Hawaiian Rep. Page 166.

There is no attempt in this case to show that these boys were other than sons of a Chinese laborer domiciled in the Hawaiian Islands and a subject of the Chinese Empire when they were born.

Upon an examination of the Constitution of the Kingdom of Hawaii and the laws thereof, I find nothing at the date of the birth of either of these boys defining the status of children born of aliens domiciled in the Hawaiian Islands which would tend to throw any light upon the status of these defendants. And the rules of international law would prevail in the absence of any especial enactment in relation thereto, and the citizenship of the children follow that of the father, in this case a subject of China, if it were not for the fact that the Constitution of Hawaii has provided in terms "that all persons born or naturalized in the Islands and subject to the jurisdiction thereof are citizens of the republic."

As was said by Judge Morrow in his very exhaustive and well considered opinion in the case of *In re Wong Kim Ark*, above referred to, quoting from Page 392,—

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"The doctrine of the law of nations that the child follows the nationality of the parents and that citizenship does not depend upon mere accidental place of birth, is undoubtedly more reasonable, logical and satisfactory, but this consideration will not justify this Court in declaring it to be the law against controlling judicial authority. In this case the question to be determined is as to the political status and rights of Wong Kim Ark under the law in this country."

It seems clear to me that as to the question of citizenship both the framers of the Constitution of the Republic of Hawaii, and of the Act of Congress providing a government for the Territory of Hawaii (Section 4 thereof) intended to refer especially to the geographical limits of the Hawaiian Islands, rather than to any political conditions existing here, and that Hawaiian and American citizenship was to be extended to all persons born in these Islands with the exception only of those "children born of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence by a fiction of public law is regarded as part of their own country."

These defendants having proven their birth in these Islands and not belonging to the excepted persons above noted, under the law they are citizens of the United States and of this Territory and as such entitled to remain.

Let them be discharged from custody.

(1) But See *United States v. Wong Kim Ark*, 169 U. S. 649.

E. A. McINERNEY, J. D. McINERNEY and W. H. McINERNEY, Trustees, etc., of M. McINERNEY, doing business in the name and style of M. McINERNEY v. THE BARK "C. D. BRYANT", her tackle, etc.

DECIDED: AUGUST 22, 1901.

1. Where it was shown that the bark C. D. Bryant, when it left its home port, San Francisco, California, was in perfect seaworthy

condition, well equipped, manned and provisioned for her voyage to Honolulu, but when moored to the wharf at Honolulu took fire in the night time, and it was found necessary to scuttle the vessel and allow her to partially fill with water in order to extinguish the said fire, by reason of which facts the cargo, including the merchandise of the libellant, consisting of clothing and shoes, was seriously damaged to the injury of libellant; and where it was shown that the fire arose through the negligence of the ship's officers in leaving an open hatch leading to the hold, wherein was stored liquors covered with baled hay, which latter formed a very combustible portion of the cargo, and no watch being kept on said ship while in port and while her cargo was being unloaded; and where there was no evidence of any "design or neglect" upon the part of the owners of said vessel by reason of which said fire might have been caused; *Held*, that under the provisions of Section 4282 of the R. S. U. S. continued in force by the Act of Congress of February 13, 1893, commonly called the "Harter" Act (Vol. 27 U. S. Stats., p. 445), the owners of said vessel cannot be held to answer for the loss or damage to libellant arising from said fire, decided to be the proximate cause of the injury to his merchandise.

2. The words, "management of the vessel," in Section 3 of the "Harter" Act, cannot refer to the navigation of the ship while at sea, because there is an especial clause as to that. It applies rather to a "fault or error" resulting from the management of the business of the ship or the discipline thereof; as in this case, the failure to have a watch while in port, which concerned both the safety of the ship and its cargo, or the failure to do some thing which does not belong to the navigation or movement of the ship, but which affects in some degree both the ship and the cargo.
3. The keeping of a watch is a "part of the management of the vessel" for the mistakes in which the owner and the vessel are both exempt under the provisions of the third Section of the "Harter" Act so-called.
4. While the case at bar is a proceeding *in rem* against the vessel, a decision in favor of libellants against the vessel and decreeing its sale for the payment of the amount of the judgment found due, would be simply a decree against the owner of the vessel; for if the vessel is sold, it is the property of the owner which is sold, and he would in that case be punished for something of which the Statute (Section 3, "Harter" Act) says he shall be exempt.
5. After the loss has been shown to have arisen by fire, the burden of proof is on those asserting the fire was caused by the "neglect or design" of the ship owner.

IN ADMIRALTY. LIBEL *in rem* FOR DAMAGES TO MERCHANDISE.

Hatch & Silliman, proctors for libellants.

Kinney, Ballou & McClanahan, proctors for respondents.

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ESTEE J. It appears that the American Bark, "C. D. Bryant," libellee herein, whereof one P. Colly is master, and J. Kentfield & Co., intervenors and claimants, are owners, was on the 18th day of June, 1901, lying in the port of San Francisco, and bound for the port of Honolulu, having on board at that time, twenty-six packages of merchandise belonging to libellant, to-wit: one case of clothing and twenty-five cases of shoes, and also having on board certain other cargo, mostly machinery, the property of other people.

That thereafter, said bark sailed for the port of Honolulu with said merchandise aboard where she arrived on or about the 3rd day of July, 1901; that on Sunday morning, the 7th day of July, 1901, a fire broke out near the forward hatch of said vessel, where the aforesaid merchandise was stowed, and by reason of said fire, large quantities of water were poured into the hold of said vessel, and the bark was finally scuttled by the Captain, in order to extinguish the fire. The ship then settled down, filled with water, the fire was extinguished and after the holes were plugged up, the water was pumped out of the vessel. In the mean time this cargo was seriously injured by the water and fire. There is no contest as to the fact of the injury or the amount thereof. The goods were sold at auction bringing three hundred and ninety-nine dollars, the owners paying at the same time \$22.50 freight thereon.

Libellants bring this action *in rem* against the ship alleging damage in the sum of eleven hundred dollars for the failure to deliver the said merchandise "in good order and condition" and alleging that by reason of the careless, negligent and improper care and custody of the said merchandise, and the want of proper care on the part of the master of the said ship, its officers crew and persons employed by him or them, the said merchandise was consumed by fire or ruined by water. The owners of the said vessel, through Captain Colly, the master, claim exemption by reason of the fact that the goods were injured by fire and that the fire was not caused by the "design or neglect" of the owners of the vessel or of the officers or crew thereof; and that

whatever loss or deterioration claimed, that the same was done without the privity or knowledge of the owners or charterers or the officers or crew of the vessel; they also claim a further exemption by reason of a clause in the bills of lading that there would be no liability upon the part of the vessel, her owner or charterers for "dangers and accidents of the seas and navigation of whatsoever kind or nature" alleging that the loss to the goods was caused by a "danger of the sea" within the meaning of the clauses aforesaid.

This ship is a common carrier for hire and the owner of all goods on the vessel is primarily entitled to have reasonable care exercised by the said carrier whether in port or not. In this case the ship is liable for the value of these goods unless they were lost by the Act of God, or public enemies, or the fault of the shipper, or by reason of some exception mentioned in the bills of lading, or under the provisions of Sections 4282 to 4287 of the Revised Statutes of the United States or of the so-called Harter Act of February 13, 1893. (Vol. 27 U. S. Stats. P. 445).

The question is were the goods damaged or lost by a fire which would exempt the owners under the provisions of Section 4282 of the Revised Statutes, which reads as follows:

"No owner of any vessel shall be held liable to answer for or make good to any person, any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the 'design or neglest' of such owner."

It seems the ship came into the port of Honolulu all right, was brought up to the wharf properly and so far as the testimony shows was well equipped, manned and provisioned for the voyage to Honolulu, and in a sea-worthy condition, and only suffered injury by reason of the fire first discovered by the carpenter of the ship about five o'clock on the morning of the 7th of July, 1901. The Captain had been out on the evening before the fire until 11 o'clock p. m. when he came aboard.

The two mates were then in their berths asleep. No watch was kept on board the vessel although the Captain testified that "that night was the second mate's turn aboard." There was a ladder down the side of the ship so that any one could get on board, and the Captain testified that after he had turned in he heard two men come aboard and also heard them walking on the deck; but it does not appear that he either got up or made any attempt to investigate who they were or what they wanted.

It further appears that in the cargo were several barrels of beer and cases or barrels of whiskey and that they were covered up with one or two tiers of baled hay; that on the morning of the fire and after it was well under way, four of the crew left the ship, two of them in an intoxicated condition.

The Captain testified: "This fire was reported to me about 5:15 in the morning of July 7th, 1901. I was in my room on the ship. When I came out of my room, the fire and smoke came out under the forward hatch and extended up as high as the foreyard. *The forward hatch was open. It was battened down the night before.* That hatch was open the biggest part of Saturday, so we could get the gear out. The fire was limited to the fore part of the ship. All my men except four responded to duty. I scuttled the ship about 9 o'clock in the morning of the 7th of July, when the ship settled down and extinguished the fire. As soon as the fire was out, I plugged up the holes. *I did not see the forward hatch put down the day before.*"

"I do not know who was aboard when I got there. I did not bother. They might have been there or ashore (referring to the sailors). The men could go ashore or stay aboard. The beer was covered with hay. A sailor will get at beer or whiskey if he can."

"I can't say whether the four sailors who left the ship got at the whiskey in the hold or not. I am trying to find out."

The Captain further testified: "I have been coming to this port several years. If I had a watchman it would appear in my accounts to the owners at the end of the voyage. The owners knew we did not have a watchman at the wharf." This

statement was to some extent qualified by the re-examination of the witness on the part of the libellee, when asked what things went into the account of the ship rendered by him to the owners at the end of the voyage: he said, "where she is and so forth."

Q. As to whether you have officers on deck at night while you are in port or not, do you report that to him?

A. No, sir.

Q. Does he (the owner, Ed. Kentfield) know anything about it so far as you know?

A. No, sir."

It is clear that the fire originated in the forward part of the vessel and it evidently commenced in the night. The forward hatch was off when the fire was discovered in the morning, and it would seem reasonable to suppose that it had not been put on since it was taken off the day before, or if put on, the officers of the vessel did not see that it was kept on, as should have been done by the maintaining of a watch on board. No one could have reached the liquors in the hold of the vessel except through an open hatch and there being no watch this was easy to do, and especially so if the forward hatch was open.

In the opinion of the Court it is quite as necessary to keep a watch on ship board when in port as when at sea, and particularly so when the hatches are opened and the cargo is exposed and in process of being removed.

The Court is satisfied that the fire was caused by the carelessness of the officers and crew of the vessel. Some of the crew evidently got at the cargo of liquors through the open hatch, which could not have occurred if a watch had been kept. Four seamen deserted on the morning of the fire and during its progress; two, if not all of them were under the influence of liquor when they left the ship, and there is a strong presumption that they had obtained the whiskey or beer or both from the cargo, for it was early in the morning when they were first seen aboard the ship intoxicated. They evidently got at the cargo during the night time, and accidentally set the baled hay on fire in the hold of the vessel. The watch on the ship was necessary

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alike for the safety of the ship and its cargo, for the loss or injury to the one might and usually would include the loss or injury to the other as in this case where it appears the loss to the ship was 50 per cent of its value. And the lack of a watch was great negligence on the part of the Captain, which was aggravated by the leaving of the hatch open, and this negligence was the greater by reason of the fact of the cargo being hay and very combustible.

In this case there is practically no testimony showing or tending to show that the owners by either their "design" or "neglect" caused this fire. The keeping of a watch is a part of the management of the vessel, for the mistakes in which the owner and the vessel are both exempt under the provisions of the third Section of the Act of Congress of February 13, 1893, commonly known as the "Harter Act," and found in Vol. 27, Statutes of the United States, page 445, and which Act but for Section 6 thereof might modify the Act of March, 1851, (Sections 4282-4287 Revised Statutes) but said Section 6 prescribes:

"That this Act shall not be held to modify or repeal Sections 4281, 4282 and 4283 of the Revised Statutes or any other statute defining the liability of vessels, their owners or representatives."

In construing the Harter Act, it was held by the Supreme Court of the United States in the case of *The Irrawaddy*, 171 U. S. 187, 193, that—

"Plainly the main purposes of the Act were to relieve the ship owner from liability for latent defects not discoverable by the utmost care and diligence, and, in the event that he has exercised due diligence to make his vessel sea-worthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel."

After the loss has been shown to have arisen by fire, the burden of proof is on those asserting the fire was caused by the neglect or design of the ship owner. *The Strathdon*, 89 Fed.

374, 377-8. *Craig v. Continental Insurance Co.*, 141 U. S. 638. So it has been held that the owner is not responsible for the negligence of the officers of the ship. *Craig v. Continental Insurance Co.*, 141 U. S. 638, 646; *Walker v. Transportation Co.*, 3 Wallace U. S. 150.

As has been said, this ship was well manned, equipped, and in a sea-worthy condition when she left the port of departure, and nothing to the contrary has been attempted to be shown upon the part of the libellants.

Referring again to Section 3 of the Harter Act, it is provided that after due diligence has been exercised to make a vessel in all respects sea-worthy, and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from *faults or errors in navigation or in the management of the vessel*.....or be held liable for losses arising from dangers of the sea. * *

It is evident that the words "management of the vessel" cannot refer to the navigation of the ship while at sea, because there is an especial clause as to that, but that it applies rather to a "fault or error" resulting from the management of the business of the ship or the discipline thereof, as in this case the failure to have a watch while in port, which concerned both the safety of the ship and its cargo; or the failure to do something which does not belong to the navigation or movement of the ship, but which affects in some degree both the ship and the cargo.

The exceptions in this case are not found alone in the bills of lading, although they stipulate to relieve the vessel "from the perils of the seas," but the proximate cause of the injury to the libellant's goods in this case did not arise from a peril of the sea but from fire while in port. The case of *The G. R. Booth* cited by counsel and found in 171 U. S. 461, is upon a careful examination not believed to be in point.

As was said in the case of *The Providence & New York S. S. Co. v. The Hill Mfg. Co.*, reported in 109 U. S. 578, quoting

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from page 602, the Court referring to the law prior to 1851, said:

"Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship owners, as common carriers, were held liable for any loss or damage caused thereby. The first Section of the Act of 1851 was no doubt intended to change this rule. It was copied (all except the last clause) from the second section of 26 George III., ch 86, passed in 1786. The last clause of the Section excepting from its operation cases in which the fire is 'caused by the design or neglect' of the owners, was probably implied in the English statute without being expressed as in ours. In all cases of loss by fire, not falling within the exception, the exemption from liability is total."

This action is a proceeding *in rem* and libellants urge strongly upon the Court that they are not asking any relief against the owners of the ship; that all they wish is a remedy against the ship itself, the offending thing. I fail to see the distinction made by counsel in this respect. A decision in favor of libellants against the ship and decreeing its sale for the payment of the amount of the judgment found due, would be simply a decree against the owner of the vessel, for if the ship is sold it is the property of the owner which is sold, and he would in this case be punished for something of which the Statute says he shall be exempt.

Counsel for libellants rely largely upon the case of the *City of Norwich*, reported in 118 U. S. 468, and also upon *The Scotland*, found in 105 U. S. page 24, but upon an examination of both these cases I find they fail to sustain his position.

In *The City of Norwich*, there was an application on the part of the owners of the vessel for a limitation of their liability under Section 4283 of the Revised Statutes. There was no question about the liability of the owners, but simply as to the amount of such liability and whether after the vessel had been appraised immediately after the collision at \$70,000, and subsequently repaired and put in good condition so as to enhance

its value greatly, it was liable beyond the said sum of \$70,000.

In reference to Section 4283, and the question whether the liability of the owner in the cases therein provided for, shall not exceed the amount of the value of his interest in the ship and freight, the Court there said:

"This provision is absolute and the owner may have the benefit of it not only by a surrender of the ship and freight, but by paying into Court the amount of their value appraised as of the time when the liability is fixed. This as we have seen enables the owner to reclaim the ship and put it into complete repair without increasing the amount of his liability. The absolute declaration of the statute that his liability shall not exceed the amount or value of the ship and freight, to-wit at the termination of the voyage, has the effect when that amount is paid into Court under judicial sanction of discharging the owner's liability and thereby of extinguishing the liens on the vessel itself and of transferring those liens to the fund in Court."

The Court saying further:

"To say that an owner is not liable, but that his vessel is liable seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand..... nor can we assent to the proposition that the proceeding (*in rem*) is not in effect a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture and it is his property which is sought to be forfeited. In the words of a great judge, 'goods as goods cannot offend, forfeit, unlade, pay duties or the like but men whose goods they are.' " (*Vaughan, C. J. in Sheppard v. Gosnold*, Vaughan 159, 172.)

Boyd v. United States, 116 U. S. 616.

In the case of *The Scotland*, 105 U. S. 24, the defense relied upon a limitation of liability under Section 4283 of the Revised Statutes, and the Court held that the "libellees should have paid the value of the ship's stripplings and remnants into Court."

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In the case of *The Anna Keene v. The Bark Whistler*, reported in 2nd Sawyer, 348, where a libel was filed *in rem* to recover damages for injuries to goods by fire caused by the alleged negligence of the master, who was also a part owner, but the loss was not caused by the design or neglect of the other part owners, it was held in construing Section 1 of the Act of March 3, 1851 (Section 4282 of the Revised Statutes) that the libel must be dismissed, the Court using the following language:

"The master as part owner is together with the other part owners, protected by the statute; but if he has been guilty of neglect he may be held responsible beyond the value of the ship and freight in a suit against him personally as master, charging him with being the cause of the damage by his misconduct, and that this cannot be done directly or indirectly in another suit, i. e., a suit against the vessel."

So also the very recent case of *The Queen of the Pacific*, reported in 180 U. S., at page 49, where in the bill of lading there was a limitation of thirty days' time within which to present a claim for damages for loss on a vessel belonging to the Pacific Coast Steamship Company. The vessel was sunk with her cargo but afterwards raised and repaired. No presentation of claim was ever made until four years thereafter, when the vessel was libelled. The defense set up non-compliance with the provision in the bill of lading. The answer was made that the "limitation applied only to the claim against the steamship company or any of the stockholders thereof, and not to claims against the vessel."

Whereupon the Supreme Court said:—

"The first objection is quite too technical. It virtually assumes that there were two contracts, one with the company and one with the ship, the vehicle of transportation owned and employed by the company; and that while the company as to all its other property is protected by the contract, as to this particular property used in carrying it out, it is not so protected. But if such be the case with respect to this particular

stipulation, must it not be so with respect to the other stipulations?..... Thus—‘the responsibility of said company shall cease immediately upon the delivery of the said goods from the ship’s tackles.’ Can it be possible that the responsibility of the ship shall not cease at the same time? ‘The company shall not be held responsible for any damage or loss resulting from fire at sea or in port.....’ but shall the company be exempt and not the ship?..... These questions can admit of but one answer. There was in truth but one contract and that was between the libellants upon the one part and the company in its individual capacity, and as the representative of the ship upon the other..... The ‘claim’ is in either case against the company, though the suit may be against the property.”

In conclusion, I am of the opinion that as the proximate cause of the injury to the libellant’s goods was due to fire on board the “C. D. Bryant,” not shown to be due either to the “design or neglect” of the owners of said vessel, the negligence shown being that of the officers and men of the ship in the “management of the vessel,” the owners are not responsible under Section 4282 of the Revised Statutes, and both the owners and the vessel are exempted under the terms of the third Section of the Harter Act, under the circumstances as shown in this case. Therefore, the libel as to the vessel should be dismissed, and the same is hereby ordered dismissed without prejudice and without costs.

IN THE MATTER OF THE BANKRUPTCY OF LUM
MAN SUK, a voluntary bankrupt.

DECIDED: SEPTEMBER 20th, 1901.

1. The provisions of Subdivision “f.” of Section 67 of the Bankruptcy Act of 1898 apply equally to voluntary as well as to involuntary proceedings in bankruptcy.
2. Subdivisions “c.” and “f.” of Section 67 of the Bankruptcy Act are hopelessly in conflict, but the weight of authority and the better reasoning sustain Subdivision “f.” where there is any question as

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- to which shall prevail in a proceeding relative to liens upon the property of a bankrupt obtained through legal proceedings within four months prior to the filing of a petition in bankruptcy.
3. On the hearing of an order of Court directed to the Sheriff of the Territory of Hawaii, upon application of the Trustee of the estate of a voluntary bankrupt, to show cause why he should not turn over to said Trustee a certain stock of merchandise in his possession belonging to the bankrupt, and levied upon and held by said Sheriff under an execution issued in pursuance of certain judgments rendered against the bankrupt by the District Court of the city of Honolulu, Territory of Hawaii, and in favor of a creditor of the said bankrupt, where it appeared that the said judgments were rendered on the third day of July, 1901, and the adjudication in bankruptcy was made on the 17th day of July, 1901; Held, that under the provisions of Subdivision "f." of Section 67 of the Bankruptcy Act of 1898, which controls in this proceeding, said judgments having been obtained "within four months prior to the filing of the petition in bankruptcy," are null and void; the execution thereunder ordered released, and the Sheriff directed to turn over the property in his possession to the Trustee of the Bankrupt's estate to be administered by said Trustee as a part of the assets of said estate.

IN BANKRUPTCY.

Application of Trustee to recover property held by High Sheriff of Territory under execution issued upon judgments of Territorial Court, made prior to adjudication in bankruptcy.

Wade Warren Thayer, Trustee in propria persona.

A. Wilder, Attorney for High Sheriff of Territory, Arthur M. Brown.

ESTEE, J. The hearing in this matter was had upon the petition of Wade Warren Thayer, Trustee of the above named bankrupt, praying this Court for an order to be issued to Arthur M. Brown as High Sheriff of the Territory of Hawaii, requiring him to show cause before this Court why he should not deliver up to said trustee, a certain stock of merchandise in his possession belonging to said bankrupt, situated in a store at 1037

Nuuau street in Honolulu, and which the said High Sheriff held under and by virtue of an execution issued in pursuance of certain judgments rendered on the 3rd day of July, 1901, in the District Court of Honolulu, Territory of Hawaii, in favor of S. M. Grinbaum & Co., and against the said bankrupt, and a portion of which said stock of merchandise the said High Sheriff was about to sell at public auction.

The facts as shown on the hearing appear to be these:

On the 17th day of July, 1901, Lum Man Suk filed in this Court, in due and regular form, a petition praying to be adjudged a bankrupt, and thereafter, on the 18th day of July, 1901, an order was made by this Court declaring and adjudging the said petitioner a bankrupt.

It further appears, that prior thereto, to wit: on the 3rd day of July, the District Court of Honolulu, Island of Oahu, rendered four judgments against the said Lum Man Suk, doing business as the Chu Yip Company, in favor of M. S. Grinbaum & Co., Limited, and executions issued out of said District Court to Arthur M. Brown, the High Sheriff of Honolulu, under which he took possession of the stock of merchandise forming a part of the assets of said bankrupt, and was about to sell the same to satisfy said judgments when this order to show cause was issued.

The Trustee of the bankrupt claims possession of these goods under the provisions of Subdivision f of Section 67 of the Bankruptcy Act of 1898, the said executions being issued upon judgments rendered within four months prior to the filing of the petition in insolvency of the bankrupt and the order of adjudication of bankruptcy, while the High Sheriff claims that this is not a case falling under the provisions of Subdivision f of Section 67, but is controlled by the provisions of Subdivision c of said Section 67.

There is no dispute as to the fact that this judgment was obtained against the insolvent within four months prior to the filing of the petition in bankruptcy, and the adjudication thereon. The point raised by the counsel for the High Sheriff that

Subdivision f applies only to involuntary proceedings in bankruptcy is not a good one in view of the provisions of Subdivision 1 of Section 1 of the Bankruptcy Act, which provides that the words—

"A person against whom a petition has been filed shall include a person who has filed a voluntary petition."

In re Blair, 108 Fed Rep. 529; *In re Lesser et al.*, 108 Fed. Rep. 203; *In re Lesser*, 100 Fed Rep. 433; *In re Richards*, 96 Fed. Rep. 935. C. C. A.

There seems to be a difference of opinion between some of the United States Courts as to the construction to be given to Subdivisions c and f of Section 67, which subdivisions are hopelessly in conflict; but I am clearly of the opinion that not only the weight of authority but the better reasoning sustains Subdivision f where there is any question as to which shall prevail in a proceeding relative to liens upon the property of a bankrupt and obtained through legal proceedings within four months prior to the adjudication. This would seem to be in accordance with the well known rules of statutory construction.

As was said by the Circuit Court of Appeals in the case of *In re Richards*, 96 Fed. Rep. 935, 939:

"The two Subdivisions c and f of Section 67 of the Bankruptcy Act relating to the effect of an adjudication of bankruptcy upon existing liens upon the property of a bankrupt acquired through legal proceedings are irreconcilable and antagonistic; and therefore in any case of conflict between them the former must give way to the latter."

The Court further saying,—

"All liens obtained through legal proceedings against an insolvent debtor within four months prior to the filing of a petition in bankruptcy, by or against him, are annulled by his adjudication as a bankrupt irrespective of the question whether the debtor suffered or permitted the lien to be obtained, and irrespective of any knowledge by the creditor of the debtor's insolvency."

See also *St. Cyr v. Daignault*, 103 Fed. Rep. 854.

So too, in the very recent case of *In re Kenny*, decided by the Circuit Court of Appeals, 105 Fed. Rep. 897, where the Court in construing Section 67 f, uses the following language:

"There can be no doubt that it was the intention of Congress by this Section to prohibit creditors of the bankrupt from obtaining preferences over other creditors as the result of any legal proceedings against him during the period of four months prior to the filing of the petition; and apt words are used to express its intention. The property of the bankrupt is safeguarded against all such proceedings by the provisions that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void and the property wholly discharged and released from the same."

It seems to me from the authorities quoted I am compelled to hold that Subdivision f controls in this proceeding, and the judgments under which the executions were issued and the property levied upon by the High Sheriff, Brown, having been obtained within "four months prior to the filing of the petition in bankruptcy," are null and void; that such executions should be released at once and the property turned over to the trustee of the bankrupt as part of the assets of his estate to be administered upon by the said trustee for the benefit of the creditors of the said bankrupt under the provisions of the Bankruptcy Act. It is so ordered.

Note: See *In Matter of Estate of S. W. Lederer*.
Infra P.—

UNITED STATES OF AMERICA *v.* ESTATE OF BERNICE PAUAHI BISHOP, DECEASED, AND JOSEPH O. CARTER *et al.* TRUSTEES UNDER THE WILL OF BERNICE PAUAHI BISHOP, DECEASED; OAHU RAILWAY AND LAND COMPANY, A CORPORATION: THE DOWSETT COMPANY, LIMITED, A CORPORATION: THE HONOLULU SUGAR COMPANY, A CORPORATION: HONOLULU PLANTATION COMPANY, A CORPORATION: CHOW AH FO, JOHN LI ESTATE, LIMITED, A CORPORATION: WILLIAM G. IRWIN, OAHU SUGAR COMPANY, LIMITED, A CORPORATION; BISHOP & COMPANY, A CO-PARTNERSHIP.

DECIDED: OCTOBER 7, 1901.

1. In the absence of any law of the Territory of Hawaii, or of any rule either of the courts of the Territory or of this Court declaring that in an action of eminent domain, that the answers shall be unverified, it is within the power of the Court to require that verified answers shall be filed to the verified petition or complaint, in conformity to the usual and uniform rule of pleading that when a complaint or petition is by law required to be verified, a verified answer shall be made thereto.
2. The oath of defendant to the allegations of his answer is quite as much in the interest of the enforcement of public justice as the oath of the plaintiff to his petition.
3. Sections 914 and 918 of the Revised Statutes of the United States should be considered together. A discretion is left with both the Circuit and District Courts of the United States to so arrange their practice, pleadings and forms and modes of proceeding as "may be necessary for the advancement of justice and the prevention of delays in proceedings."
4. Where a motion to strike out certain portions of the answers of defendants was granted, and certain defendants, instead of striking out the objectionable matters and filing the original answers as amended, filed new and different answers consisting of a general denial unverified, with a notice of what the defense would be forming a part of said answers, a motion to strike said amended

answers, so-called, from the files granted, with leave to defendants to file the original answers, re-engrossed and verified, to conform to the original order of the Court.

EMINENT DOMAIN. MOTION TO STRIKE OUT CERTAIN AMENDED ANSWERS.

J. J. Dunne, United States Assistant District Attorney, appearing for the plaintiff.

Hatch & Silliman, appearing for the defendants, Oahu Sugar Company, Limited, Oahu Railway and Land Company, Limited, Honolulu Plantation Company, and The Dowsett Company, Limited, defendants concerned in the motion.

ESTEE J. On the 6th day of July, 1901, this action was instituted by the filing of a verified complaint on the part of the United States and the issuance of a summons directed to all of the defendants named in the said petition; thereafter, on the 26th day of July, 1901, the said summons was returned and filed with return of service made by the Deputy United States Marshal, upon the following named defendants to wit:

Estate of Bernice Pauahi Bishop, deceased, Oahu Railway and Land Company, Limited, The Dowsett Company, Limited, Honolulu Sugar Company, Honolulu Plantation Company, John Ii Estate, Limited, William G. Irwin, Bishop & Company, and the Oahu Sugar Company, Limited.

Thereafter, verified answers were filed in the case by the defendants, Oahu Sugar Company, Limited, The Honolulu Plantation Company, Limited, The Oahu Railway and Land Company, Limited, the Estate of Bernice Pauahi Bishop, deceased, Estate of John Ii, Limited, and Bishop & Company. Each of said verified answers contained a claim for a jury trial as a part of the allegations thereof.

The attorney for the petitioner deeming said matter irrelevant, made a motion to strike out all that portion of each of said answers relating to the claim for a jury trial, and this Court on the 18th day of September, ordered said matter stricken from each of said answers and by its written order gave each

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of the defendants ten days within which to file amended answers thereafter "and to take such other steps as they may be advised."

Within said ten days, the defendants, John Ii Estate, Limited, Bishop & Company and the Estate of Bernice Pauahi Bishop, deceased, filed answers, similar in form and substance as their original answers with the redundant matter stricken out, and these answers were verified as were their original answers.

While the defendants, Oahu Sugar Company, Limited, the Oahu Railway and Land Company, and the Honolulu Plantation Company filed so-called amended answers which were new and different answers entirely. They were general denials unverified, and forming a part of each answer were notices of what the defense to the action would be.

The Dowsett Company, Limited, filed its first answer in the case on September 20th, 1901, in form a general denial and unverified.

Thereafter, on the 23rd day of September, the attorney for the petitioner made a motion to strike out all of the answers of these last named defendants, said motion being upon the ground that said so-called "answers" or "amended answers" were and each of them was "unverified, unauthorized by any law or rule or order of Court, sham, irrelevant, contradictory, inconsistent, insufficient, substituted but not amended matter, not specific and evidentiary and probative."

This motion came on regularly to be heard on September 30th, 1901, and it is this motion the Court is now considering.

The principal question arising under this action so far as the defendants, Oahu Sugar Company, Limited, Oahu Railway and Land Company and The Honolulu Plantation Company are concerned, is whether they have gone beyond the scope of the order of this Court striking out the irrelevant and redundant matter complained of in the first motion to strike out portion of each of the original answers.

It seems to me clear that there could be no such construction placed upon such order as would entitle these defendants

to take the steps they have taken in this matter. The order was intended simply to allow the filing of amended answers with the offensive matter stricken therefrom, and as that matter was copied in the order and related entirely to the question of a claim for a jury trial, it could not be misunderstood. The words "and take such other steps as they may be advised" was intended by the Court to give said defendants an opportunity to renew their application for a jury in any proper manner.

This was evidently clear to the other defendants in the case appearing upon the first motion, for they filed verified answers herein with the redundant matter stricken out.

But counsel claims they are following the local practice in the Courts of this territory by filing this form of an unverified answer and that as the United States is proceeding under the provisions of the Act of Congress of August 1, 1888, that this Court is bound to follow the same territorial laws in relation "to practise, pleading, forms and modes of proceeding."

It should be noted that the single object of condemnation proceedings is to fix the compensation for the property taken. *O'Hare v. Railroad*, 139 Ill. 151; *Lamb v. Schottler et al.*, 54 Cal. 319; *Garrison v. New York*, 21 Wall, U. S. 196.

And the object of all trials is to bring out the truth, and as the pleadings precede the trial, the pleadings should allege the truth. That cannot be done under a verified complaint and an unverified answer. As a rule the one is the solemn testimony of the plaintiff himself; the other the unverified allegations of defendant's attorney. The one confines plaintiff to exact and truthful statements under oath; the other opens wide the field of inquiry by unverified allegations which may be true or false but which necessarily lead to delay and which can serve no good purpose.

Section 2 of the Act of Congress of August 1, 1888, being "An Act to authorize condemnation of land sites for public buildings and other purposes", under which this proceeding is instituted, is almost identical in language with Section 914

of the Revised Statutes of the United States, which prescribes that:

"The practice, pleadings and forms and modes of proceeding in civil causes.....in the Circuit and District Courts shall conform as near as may be to the practice, pleadings, forms and mode of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the Court to the contrary notwithstanding."

Section 918 of the Revised Statutes, forming a part of the same Act as Section 914, and embodied in the rules of this Court, provides:

"That the several Circuit and District Courts may from time to time, and in any manner not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice, as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

It is clear that any construction by the Courts of the language of Section 914 of the Revised Statutes would be equally applicable to Section 2 of the Act of August 1, 1888.

As was said by the Supreme Court of the United States in construing Section 914 of the Revised Statutes and other Sections thereof including Section 918,—

"It is obvious that a strict and literal conformity to the state provisions regulating procedure is practically impossible or at least not without overturning and disarranging the settled practice in the Federal Courts. *Shepard v. Adams*, 168 U. S. 618-624; also quoting approvingly from the case of *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 291, where a similar view was taken and the Court there saying:

"The conformity is required to be 'as near as may be,' not as near as may be possible or as near as may be practicable.

The indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding and gave them the power to reject as Congress doubtless expected they would do, any subordinate provision in such state statute which in their judgment would unwisely encumber the administration of the law or tend to defeat the ends of justice in their tribunals."

It was also held by the Supreme Court in the case of *In re Chateaugay Ore & Iron Co.*, petitioner, 128 U. S. 544, that "the practice and rules of a state Court do not apply to the proceedings taken in a Circuit Court of the United States for the purpose of reviewing in this Court, a judgment of such Circuit Court; and that such rules and practice embracing the preparation, perfecting, settling and signing of a bill of exceptions, are not within the practice, pleadings, forms and modes of proceeding which are required by Section 914 of the Revised Statutes to conform as near as may be to those existing at the time in like causes in the Courts of Record of the state." See also *S. P. R. R. Co. v. Denton*, 146 U. S. 202.

It would appear also from the provisions of Section 918 above quoted, and the foregoing decisions that the two Sections, 914 and 918 should be considered together and that while this Court should conform to the practice, and pleading, forms and mode of proceeding of the state Courts, as near as may be, yet a discretion is left with both the Circuit and District Courts to so arrange their practice, pleadings, forms and modes of proceeding as "may be necessary for the advancement of justice and the prevention of delays in proceedings." (1)

The forms of pleading in the territorial Courts of Hawaii are certainly original with this territory, although it is claimed that the following has been the law for over fifty years.

It is provided by Section 1215 of the Civil Laws thereof, that:

"Every civil action hereafter to be tried in any of the Courts of record in this Republic (now Territory) shall be commenced by petition, which petition shall be verified by the oath

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of the plaintiff or some one in his behalf deposing to the best of his knowledge and belief."

Plaintiff complied with this requirement of the statute and verified its petition filed herein.

As to the answers to be interposed, Section 1223 of the same Civil Laws provides:

"It shall be incumbent upon every defendant served with process of summons.....to file with the Clerk of the Court, an answer to the plaintiff's demand, either admitting all the facts stated in the petition to be true, and denying that they are sufficient in law to support the plaintiff's demand,or denying the truth of the facts stated in the petition which shall form an issue of fact to be determined by the jury. After either of these answers, there shall be no further pleading."

I have been unable to find any other statute of the Civil Laws of Hawaii or any rule of Court requiring either that the said answer should or should not be verified. But all petitions (or complaints) must be so verified. This Court assumes that from the very nature of the answer prescribed in Section 1223, it must be verified, because the answer *must deny the truth* of the facts stated in the (sworn) petition, in order that they shall form "an issue of fact to be determined by the jury."

There is nothing in the rules of this Court upon the subject of verification of pleadings in cases of this character.

But the pleader has no right to assume that because the statute is silent on the single point as to the verification of the answer while requiring a verified complaint, that the usual and uniform rule of pleading shall not be followed, namely, that when the complaint or petition is by law required to be verified that a verified answer shall be made.

"The office of a pleading is to present the cause of action on the one side and the defense on the other and this is true of any system of pleading. The principles of pleading, whatever the system, are always the same."

Boone on Code Pleading, Sections 2 and 3. *Buddington v. Davis*, 6 How. Prac. 401.

County v. Decker, 30 Wis. 624.

This opinion is not intended in any way to influence the practice in the territorial Courts except as such practice would interfere with the usual rules of pleading in this Court. It is clear to the Court that the oath of defendant to the allegations of the answer is quite as much in the interest of the enforcement of public justice as the oath of plaintiff to his petition, and it seems unreasonable to put the plaintiff upon his oath and leave the defendants to file any sort of an unverified denial they may see fit. And so in the absence of any law of the Territory of Hawaii, or of any rule of either the Courts of the territory or of this Court, declaring that in this form of action, the answers shall be unverified, this Court must hold that it is within its power to require that verified answers shall be filed to the verified petition or complaint herein.

It has been held that—

“The verification of pleadings by which the contention between litigants is narrowed to the minimum is calculated to promote the ends of justice by constraining the parties to limit their controversy to such matter as they can respectively deny and affirm on oath.” *Cottier v. Stimson*, 18 Fed. 689, 691. *Osborne v. City of Detroit*, 28 Fed. 385-8. *Erstein v. Rothschild*, 22 Fed. 61, 64.

The foregoing is the rule adopted in other United States Courts and it seems sustained by the better reasoning.

In conclusion, therefore, this Court holds that the so-called amended answers of the Oahu Railway and Land Company, the Oahu Sugar Company and the Honolulu Plantation Company, should be stricken from the files because they are not within the terms of the order of this Court dated September 18, 1901, striking out a portion of the original answers of said defendants theretofore filed herein, are general denials and not verified; and that the answer of Dowsett Company, Limited,

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be stricken from the files upon the ground that it is unverified and a general denial.

That the defendants, Oahu Railroad and Land Company, Oahu Sugar Company and Honolulu Plantation Company shall each have three days from the date hereof, within which to file their original answers re-engrossed to conform to the order of this Court previously made, striking from said answers their and each of their claims for a jury trial; and the defendant, Dowsett Company, Limited, is hereby given three days from the date hereof within which to file a duly verified amended answer.

Note 1. See the case of *Berger v. Bishop. Infra.* P 405

UNITED STATES OF AMERICA *v.* KAWASAKI.

DATED: OCTOBER 29, 1901.

1. By Section 3242 of the Revised Statutes of the United States a special tax is required for the privilege of carrying on the business of a retail dealer in liquors.
2. Retail dealer in liquors defined by Section 3244 (4th Subdv.) R. S. U. S.
3. The words, "otherwise than as hereinafter provided," found in Subdivision fourth of Section 3244 of the R. S. U. S., have been held by the Supreme Court of the United States to refer to wholesale liquor dealers in distilled spirits, wholesale and retail dealers in malt liquors, brewers and others who are either exempt from taxation or pay a different tax.
4. When a person obtains spirituous or malt liquors which he intends to sell again in small quantities to anyone who wishes to purchase the same, or who, having spirituous or malt liquors on hand, intends to sell the same to any person who may apply for them in small quantities, or, in the language of the statute, "in quantities of less than five gallons," he must pay the special tax required by the government, and any failure to do so is a violation of the law.

CRIMINAL LAW. INDICTMENT UNDER SECTION 3242 OF THE REVISED STATUTES OF THE UNITED STATES.

Robert W. Breckons, U. S. District Attorney, for the government.

Frank E. Thompson, for the defendant.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the Jury: The defendant in this case is indicted for violating the provisions of Section 3242 of the Revised Statutes of the United States, in that he carried on the business of a retail liquor dealer without having paid the special tax required by the government.

To this indictment, the defendant pleaded not guilty.

In this case, gentlemen, you are to be the sole judges of the facts; the law you are to take from the Court.

In all criminal cases, innocence is presumed until guilt is proven. I therefore instruct you that in considering the evidence in this case, you are to remember that the burden of proof lies upon the government to establish the guilt of the defendant, and you are to give the defendant the benefit of all reasonable doubts. And by a reasonable doubt, gentlemen, I mean, that, after an entire comparison and consideration of all the evidence, your minds are left in that condition in which you cannot say that you feel an abiding conviction to a moral certainty of the guilt of the defendant.

In arriving at a verdict in this case you are not necessarily to be controlled by the number of witnesses who may have testified on one side or the other, but rather by the conviction which the testimony may convey to your minds of the truth or falsity of the charge, whether such testimony be given by one or many witnesses.

Gentlemen of the jury, I instruct you that it is the policy of the government of the United States to levy a special tax upon certain occupations, among them being that of a retail dealer in liquors.

Congress has defined the terms "retail liquor dealer" as follows:

"Every person who sells or offers for sale, foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided, in less quantities than five gallons at

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the same time, shall be regarded as a retail dealer in liquors." Subdivision 4, Section 3244, R. S., U. S.

The words "otherwise than as hereinafter provided" has been held by the Supreme Court of the United States to refer to wholesale liquor dealers in distilled spirits, wholesale and retail dealers in malt liquors, brewers and others, who are either exempt from taxation or pay a different tax.

The question then presented for your consideration in this case is,—

Did the defendant carry on the business of a retail liquor dealer?

In this connection, gentlemen, I instruct you that when a person obtains spirituous or malt liquors which he intends to sell again in small quantities, to any one who may wish to purchase the same; or who having spirituous or malt liquors on hand, intends to sell those spirituous or malt liquors to any person who may apply for the same in small quantities,—or, in the language of the statute in quantities of "less than five gallons", he must pay the special tax required by the government. And if he does not pay the special tax, his attempt to carry out his intention, is a violation of the law, for he is engaged in the business of retailing liquor without having conformed to the law by the payment of such tax.

I instruct you further, gentlemen, that if you bring in a verdict in this case of either guilt or innocence, it must be by the unanimous assent of all your members.

CHARLES H. BROWN, *v.* T. F. DAVIDSON, J.- N. SHAFFER, JAMES NOTT JR., E. R. BATH, H. GHERING, W. W. CROSS, A. PILAS, E. W. QUINN, W. W. GRAHAM, JOHN NOTT, W. J. ENGLAND, E. PAXTON, O. SELLERS, PATRICK O'DONNELL, FREDERICK HOLLAND, FRANK RICKENBERG, A. KISTER, JOHN MOORE, E. GOULD, THOMAS CALLIHAN, JOHN DOE SULLIVAN, *et al.*

DATED: OCTOBER 30, 1901.

- 1 A contract, combination or conspiracy in restraint of trade under the Act of Congress of July 2nd, 1890, is one wherein two or more parties agree, either in writing or verbally, either as individuals or as members of an association, not to sell to or purchase of, or employ or accept employment from, any person not a member of such association, combination or conspiracy, or a party to such contract, with the intent to exclude and prevent from purchasing from, selling to, making contracts for work with, or hiring as workers, any and all persons not a member of such association, combination or conspiracy, or a party to such contract.
2. The fundamental principle of the law of damages is that the person injured in his personal or property rights shall receive compensation therefor.
3. Elements of damage: Actual losses which can be specifically stated and proven, such as loss of profits from inability to accept contracts; actual losses which can be specifically stated and proven from increased expenditures incurred in filling contracts already taken; loss and injury to an established business.
4. Damages must be reasonable and ascertainable from the facts presented in evidence.
5. Burden of proof on plaintiff to show actual damage to business.
6. Damages must be specifically stated and must be the direct, proximate and natural consequence of the contract, combination or conspiracy complained of.

LAW. ACTION TO RECOVER DAMAGES UNDER SECTIONS 3 AND 7 OF "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES", DATED JULY 2, 1890.

Thomas Fitch, for plaintiff.

Magoon & Thompson and *C. C. Bitting*, for defendants.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the Jury: This is an action at law brought by the plaintiff to recover damages which he alleges, he has sustained through injury to his business as a master plumber, having his shop and store in the city of Honolulu in the Territory of Hawaii, by reason of the defendants entering into an agreement in writing, which as plaintiff alleges,

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comes within the prohibition provisions of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," being Chapter 647 of Volume One of the Supplement to the Revised Statutes of the United States.

The especial provisions of said Act which plaintiff bases his action upon, are the two following Sections, to wit:

Section 3, which reads in part as follows:

"Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the United States.....is hereby declared illegal."

"Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor....."

And Section 7 of said Act, which reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit including a reasonable attorney's fee."

Under the prohibition of these two Sections, the plaintiff charges the defendants (certain of whom belonged to an association known as the Master Plumbers' Association, and certain others to an association known as the Journeyman Plumbers' Union) with violating Section 3 of the Act above quoted, by entering into an agreement in writing, by which certain of the defendants composing the aforesaid Master Plumbers' Association, both individually and as members thereof, agreed and promised not to hire or employ as journeyman plumbers any person or persons except certain other of the defendants both individually and as members of the Journeyman Plumbers'

Union aforesaid; and it is charged that the said defendants, members of the said Journeyman Plumbers' Union, agreed and promised not to work for any person or firm except the defendants belonging to the Master Plumbers' Association.

It is further charged that by reason of the alleged contract and the acts of the defendants thereunder, plaintiff has been injured in his business and that special damages have been inflicted upon him by reason of the existence of said contract, in that he is unable to obtain any of the defendants who are journeyman plumbers to work for him and is thereby unable to sell plumbers goods or supplies or to take contracts or execute work.

A contract, combination or conspiracy in restraint of trade under the Act of Congress of July 2, 1890, is one wherein two or more parties agree either in writing or verbally, either as individuals or as members of an association, not to sell to or purchase of or employ or accept employment from, any person not a member of such association, combination or conspiracy, or a party to such contract, with the intent to exclude and prevent from purchasing from, selling to or making contracts for work with, or working for or hiring as workers, any and all persons not a member or members of such association, combination or conspiracy, or a party to such contract.

Gentlemen of the jury, you are to be the judges from the whole of the testimony introduced, as to whether a combination or conspiracy in restraint of trade exists or did exist in this case.

The Court instructs you that if you believe from the evidence that there was an agreement as claimed by plaintiff, binding the members of the Master Plumbers' Association not to give employment to any plumber not a member of the Journeyman Plumbers' Union, and binding the members of the Journeyman Plumbers' Union not to accept employment from any one not a member of the Master Plumbers' Association, and if you be-

lieve from the evidence that said agreement, if any there was, was in writing and was destroyed by the defendants or any one of them, then I instruct you that it is presumed the said contract or agreement in writing, if produced, would have been against the defendants, for the presumption is that when a party wilfully and knowingly destroys a written contract he does so because he deems it to his interest to get rid of it.

Gentlemen of the jury, if you believe from the evidence that the defendants or any two or more of them agreed either in writing or verbally, to and with each other, or with any person or persons whatsoever, either individually or as directors, trustees, representatives or members respectively, of the Master Plumbers' Association, or of the Journeyman Plumbers' Union, or both, that they, who were master plumbers, would not employ any person as a journeyman plumber who was not a member of the Journeyman Plumbers' Union, and that they who were journeyman plumbers would not accept employment from any person who was not a member of the Master Plumbers' Association,—and if you believe from the evidence that prior to defendants or two or more of them entering into such an agreement, the plaintiff, Charles H. Brown, was engaged in business as a master plumber in the city of Honolulu, and further believe from the evidence that one of the objects of such an agreement between defendants or any two or more of them with each other or with any person whatever was to prevent the plaintiff, Charles H. Brown, from obtaining plumbers to work for him, and to prevent him from making or carrying out contracts for plumbing work, and to drive him out of business as a master plumber,—then you are instructed that such an agreement for such a purpose (if you believe from the evidence that such an agreement for such a purpose was made) was a contract, combination or conspiracy in restraint of trade, in violation of the Act of Congress of July 2, 1890, entitled "An Act to

protect trade and commerce against unlawful restraints and monopolies."

Gentlemen, I instruct you that the fundamental principle of the law of damages is that the person injured in his person or property rights shall receive compensation therefor. Whether in contract or tort, the true primary consideration is the same —compensation for damages suffered.

I instruct you that in estimating damages, if you believe from the evidence that damages were sustained by the plaintiff, and that such damages would not have been sustained except for the contract, combination or conspiracy of defendants referred to, you have a right to take into consideration,—

1st. Actual losses which can be specifically stated and proven; such as loss of profits from inability to accept offered contracts, from the taking and fulfillment of which specific profits would have been derived; 2nd. Actual losses which can be specifically stated and proven from increased expenditures incurred in fulfilling contracts already taken; and 3rd. Loss and injury to an established business.

Gentlemen, you are not limited as to the amount of damages, should you find from all the testimony that plaintiff has been damaged; that is to say, you are the sole judges of whether plaintiff has been damaged, and if so, in how much. But this must be controlled by the testimony. You have no right in fixing the damages to go into the field of conjecture and guess at the amount of injury he has suffered, if any.

If you find from the evidence that the plaintiff has been injured in his business by reason of an unlawful agreement made between the defendants, you will find for the plaintiff, and in such sum as shall represent the actual damages sustained by him.

It is for the Court in entering judgment upon the verdict (in the event that you shall find a verdict in favor of the plain-

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tiff) to treble the amount of damages as provided by the statute. The trebling of the damages you have nothing to do with.

The sole question as to damage in the case must relate to the injury which the plaintiff may have sustained by reason of the unlawful agreement or combination in question, if you should find that there was such an unlawful agreement and combination.

I instruct you further, that the burden of proof is on plaintiff to show some real and actual damage by reason of the entering into by the defendants or any two or more of them of the said agreement or combination. There is no duty imposed by the law upon defendants to show that their acts have not worked an injury to the business of the plaintiff. On the other hand, the duty and burden of proving damage to his business is imposed by law upon the plaintiff; and unless he proves damage to his business by a preponderance of the evidence, the verdict must be for the defendants.

I instruct you that mere speculation as to the possible profits of a business in the absence of evidence directed to the existing conditions, cannot be indulged in by you for the purpose of finding a verdict in damages. The damages which the law contemplates and which the Act of Congress provides for, must be reasonable damages ascertainable from the evidence presented for your consideration.

There must be actual evidence of facts of some material character relating to the business of the plaintiff from which you can ascertain with reasonable certainty, that damage has actually been suffered to such business before any verdict in damages can be returned.

The plaintiff in actions of this kind is not permitted to claim damage to his business by reason of a combination or contract contrary to the statute, where it was within his power in exercising a reasonable diligence to avert such damage and to avoid any injury to his business; that is to say, a party claiming

damages is bound in the exercise of reasonable diligence to protect himself against any consequences flowing from the act of another which can fairly be avoided.

In estimating damages, you are instructed further, that no damages can be given which cannot be stated specifically and which is not the direct, proximate and natural consequence of the contract, combination or conspiracy complained of. If the jury believe from the evidence that the defendants or any two or more of them entered into a contract or conspiracy in restraint of trade in violation of the Act of Congress of July 2, 1890, with each other or with any person whatever, and further believe from the evidence that as a direct, proximate and natural consequence of such contract, combination or conspiracy, the plaintiff was actually injured in his business and suffered damages which can be stated specifically, then in estimating such injury, you have the right to take into consideration the pecuniary advantages which you believe from the evidence the plaintiff would have realized but for the contract combination or conspiracy complained of. If you believe from the evidence that such contract, combination or conspiracy (if you should find that the defendants or either of them entered into such) frustrated a business scheme or schemes of plaintiff, and that by such contract, combination or conspiracy he was prevented from realizing pecuniary advantages, that would have resulted to him if it had not been for such contract, combination or conspiracy, then the jury will find for the plaintiff and against such defendant or defendants (if any) as participated in such contract, combination or conspiracy.

You are further instructed that labor has the same right to organize in its own interests as has capital, but that no body of men representing capital or labor, or whatever their calling, has the right to so organize as to injure other men in their legal calling. Restraints of trade are illegal under the Act of Congress of July 2, 1890. I further instruct you, that you are to

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be the sole judges of the facts. The law you will take from the Court. If during the trial, the Court has in any manner or at any time, by any form of expression, appeared to convey to your minds the idea that he favored either side in this action, such expression was not so intended and you should not so consider it, but eliminate the same from your minds entirely. You should go to your jury room absolutely free and unbiased, paying attention only to the testimony, the arguments of counsel and the instructions of the Court.

It requires the unanimous action of all your number to find a verdict, and in reaching a verdict you are to be controlled by the weight of the evidence brought to your attention. You are the sole judges of the truthfulness of witnesses and in that connection, I instruct you that you are to be guided by a preponderance of the evidence as to any given fact to be considered by you. That is, if there should be testimony for plaintiff's contention and also for defendants' contention, you are to weigh the same on both sides and give your verdict for what you may believe to be, under your oaths, the strongest and most truthful side of the case. In reaching a conclusion you are not to be controlled by the number of witnesses testifying for either party in the case, but rather from a fair consideration of all the testimony given and the probability of its disinterested truthfulness.

UNITED STATES OF AMERICA *v.* M. OHTA.

DATED: NOVEMBER 9TH, 1901.

1. Eight hours in any calendar day, limit of service of laborers or mechanics on any of the public works of United States or District of Columbia, except in case of "extraordinary emergency."
2. Intent shown by commission of prohibited act.
3. Ignorance of law no excuse; foreigner must obey the laws, which he is presumed to know.
4. "To require"—construction of as used in Statute under which defendant is prosecuted; "to permit"—ditto.

5. Hearsay evidence; number of witnesses.
6. Asiatic nationality of defendant not to be considered; entitled to same rights in this class of cases as American citizen.
7. Asiatic witnesses.
8. Defendant not relieved from responsibility by showing some one else equally culpable with him.
9. Act need not be proven to have been committed on day named in indictment to warrant conviction.

CRIMINAL LAW.

Indictment under Act of Congress of August 1, 1892, relating "to limitation of hours of daily service of laborers and mechanics employed upon the public works of the United States and District of Columbia."

J. J. Dunne, Assistant U. S. District Attorney, for the government.

Kinney, Ballou & McClanahan, for defendant.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the jury: I instruct you that it is prescribed by an Act of Congress of the United States entitled "An Act relating to the limitation of hours of daily service of laborers and mechanics employed upon the public works of the United States, and of the District of Columbia," passed August 1, 1892, and found in Vol. 27 U. S. Statutes at Large, Page 340, that—

Section 1. "The services or employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or sub-contractor upon any of the public works of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such

contractor or sub-contractor, whose duty it shall be to employ, direct or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any one calendar day except in case of extraordinary emergency."

It is further provided by Section 2 of the same Act, that—

Section 2. "Any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or sub-contractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished....."

The policy of this Act of Congress is something with which neither the Court nor the jury has anything to do. We are not responsible for it. Congress has seen fit to enact this law and it is obligatory upon all to obey it and enforce it. And we are called upon to do so no matter how much the public service may be prejudiced by such enforcement.

I instruct you, gentlemen of the jury, that the work upon which this defendant was engaged was a public work in the sense referred to in the language of the statute, to-wit: a public building being constructed for the uses and purposes of the government of the United States upon the Naval Station in the City of Honolulu, District of Hawaii.

You are further instructed that the construction of this building upon which this defendant was engaged was not a case of "extraordinary emergency" mentioned in the Statute.

The question of intention, gentlemen, to commit a crime, is to be found upon an examination of the circumstances of each case. If it appear affirmatively that the defendant deliberately

committed a public offense, the law presumes that he knew what the law was, and the question of intent is shown by the commission of the act itself.

Ignorance of the law is no excuse for violation of the law. In order to commit the crime prescribed in the Statute under which this defendant is being prosecuted, there must be an intentional violation of the provisions of the law by the defendant. That is to say, the act must be knowingly or intentionally committed in order to make such an act a crime. But the intention which enters into the offense described in the Act of Congress read to you, is simply an intention to do the act which is prohibited by the Statute and the crime is complete when the act is intentionally done.

Gentlemen of the jury, "to require" is to command, to order, to direct; and if you believe from the evidence, beyond a reasonable doubt, that the defendant herein ordered or commanded or directed any one of the mechanics working upon said public works of the United States under his direction or control, to work more than eight hours in any one calendar day, and that he did so work, then you should find a verdict of guilty.

"To permit," as used in the language of the Statute, is to suffer to be done, to allow or consent to; and if you believe from the evidence, beyond a reasonable doubt, that the defendant herein permitted or suffered to be done or allowed or consented to the doing of more than eight hours' work upon any one calendar day by any one of the mechanics employed under his direction or control, upon the construction of the said building, then you should find the said defendant guilty under the provisions of the Statute.

Gentlemen, you are not to give any consideration to hear-say testimony or evidence. Evidence is called hear-say when its probative force depends in whole or in part upon the competency or credibility of some person other than the witness by whom it is sought to produce it.

You are not to be governed by the number of witnesses in the case on one side or the other; but rather by the character

of their testimony submitted for your consideration. You are to consider not only what the witnesses testified to, but the character of their conduct while testifying, and you are to be the sole judges of their truthfulness. And after giving the defendant in this case the benefit of all reasonable doubts, and after bearing in mind that he is presumed to be innocent until shown to be guilty, you can act by finding such a verdict as to you may seem just.

In trials of this character, an Asiatic is entitled to exactly the same rights that an American citizen is entitled to. So defendant's nationality should have no effect upon your minds in arriving at his guilt or innocence.

A Japanese who is entitled to come here, is entitled to work here, but he, like all other people of every nationality, must obey the laws of this country while here, and which laws he is presumed to know. It is the policy of American law to protect labor and laborers, and so Congress has enacted that eight hours shall constitute a day's work when the laborer is working upon any of the public works of the United States.

You are, gentlemen, to be the sole judges of the facts in this case and of the weight of the testimony given herein; and you are instructed that you are not to consider the fact that any one of the witnesses in this case belongs to an Asiatic race or that he or they is or are a citizen or citizens of Japan.

Every material allegation of the indictment must be proven in this case to justify a conviction; and unless you are convinced from all the testimony in the case, beyond a reasonable doubt, that defendant is guilty, you should find a verdict of acquittal.

You should bear in mind the conduct of the witnesses on the stand, and you have the right, and it is your duty in arriving at the facts in this case, to note any conflict of testimony between the various witnesses who testified in the case on one side or the other, and if possible, you are to harmonize their contradictory statements; but if, after a careful examination of all the testimony, this is found to be impossible, then such contradictory

statements must be taken against the party causing such conflict.

You are further instructed that this defendant cannot relieve himself from responsibility in this case by showing that some one else is equally culpable with himself. If you believe from the evidence that the five Japanese or any number of Japanese with this defendant, did this sub-contract work and that any one of them did work more than eight hours in any one calendar day in doing it, under the direction of the defendant, and that defendant was named as the sub-contractor, and the other five Japanese were not known to the principal contractor as sub-contractors, although among themselves they may have had an arrangement to divide the receipts for doing the work, defendant is not thus relieved from his responsibility in the case as sub-contractor if he knew all the facts in the matter and joined in the said agreement.

And if from all the evidence, and beyond a reasonable doubt, you believe the defendant was a sub-contractor, under the provisions of the Statute, and that in order to relieve himself from responsibility under the law, he combined with five other Japanese to evade the provisions of the law, and that any one of these Japanese worked more than eight hours in any one calendar day, through his requiring them to do so, or permitting or allowing them to do so intentionally, then you should find a verdict of guilty.

I further instruct you that it is not necessary in order to warrant a conviction, that the government should prove that the act complained of was committed on the particular day named in the said indictment, but only that the said act was committed on some day prior to the date of the said indictment.

You are to be the judges whether this building could be constructed according to the specifications accepted by the government, (which specifications have been introduced in evidence) without the knowledge of the terms of said specifications.

I further instruct you that a combination among a few or many persons who combine together for the purpose of avoiding

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the effect of a violation of the laws of the United States, is no excuse for such violation of the law by any member of that combination who is being prosecuted therefor.

In order to arrive at a verdict in this case, gentlemen of the jury, either of conviction or acquittal, your verdict must be unanimous; that is, it must be joined in by all twelve of the jurors.

Note: To the same effect see *U. S. v. Campbell*, dated November 7, 1901, not reported.

**THE HAWAIIAN TRAMWAYS COMPANY, LIMITED,
v. THE RAPID TRANSIT AND LAND COMPANY.**

DECIDED: DECEMBER 4, 1901.

1. The decision of the Supreme Court of the Territory of Hawaii construing the charters granted by the Legislature of Hawaii to two certain street railway corporations and deciding their respective rights thereunder to lay tracks in certain of the streets of the city of Honolulu, Territory of Hawaii, held to be binding upon the United States District Court upon an application for an injunction by one of said corporations to restrain the other from laying tracks in said streets of Honolulu, and said Court to be without jurisdiction, in the absence of any showing that a Federal question was involved. The injunction denied.
2. It is always presumed that an attorney appearing and acting for a party to a cause has authority to do so, and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence.

IN EQUITY.

{ Application for injunction to restrain laying of street railway tracks on King street, in city of Honolulu.

J. J. Dunne and John T. De Bolt, attorneys for petitioner.

W. R. Castle and Kinney, Ballou & McClanahan, attorneys for respondent.

ESTEE, J. This is a bill in equity filed by the Hawaiian Tramways Company, Limited, and verified by the oath of W. H. Pain, as manager for said company, to enjoin the defendant, its associates, counsellors, solicitors, agents, contractors and servants from entering into or upon King street, in the city of Honolulu, for the purpose of locating, constructing or operating a street railway therein, adjoining, alongside of or parallel with the street railway of the Hawaiian Tramways Company, Limited, and from digging up or subverting the soil, surface or paving of said King street or doing any other acts in said King street tending to obstruct in any way the free and common use thereof as had theretofore been enjoyed, or tending to intermeddle or interfere with or obstruct the rights of the petitioner therein, or in the beneficial enjoyment of its franchises therein.

Petitioner also prays for a preliminary injunction against the said Rapid Transit and Land Company from doing the aforesaid acts.

An order to show cause why a preliminary and temporary injunction should not issue against it, was directed to the Rapid Transit and Land Company, made returnable on the 11th. day of November, 1901.

The facts as shown by the bill and the affidavits and oral testimony introduced at the hearing appear to be these:

That the Hawaiian Tramways Company, Limited, is a foreign corporation organized under the laws of Great Britain and Ireland, and operating in the streets of Honolulu, the street railway hereafter mentioned; that in and by Act XVIII. of the Session Laws of 1884, of the Kingdom of Hawaii, a grant was made to "William H. Austin and his associates and assigns or such corporation as may be incorporated or organized by him or them, to construct, lay down, maintain, and operate for the term of thirty years from the passage of this Act, a single track street railway with all the necessary curves, switches and turn-outs, or double track street railway through such of the streets mentioned in this Act.....along and upon the following

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streets in the city of Honolulu.....". Among said streets enumerated, was King street.

The Hawaiian Tramways Company, Limited, is the successor in interest of the said William R. Austin and his associates.

On July 7th, 1898, Act 69 of the Session Laws of 1898 was passed by the Legislature of the Republic of Hawaii and duly signed by the President of the Republic. In and by said Act 69, a grant was made to Clinton G. Ballentyne and others, conferring the right "to construct, lay down, maintain and operate for the term of thirty years after the railway authorized by this Act shall have been commenced, a railway, either single or double track, or partly single and partly double, with such curves switches, turnouts, poles, wires underground or overhead conduits and such other appliances and appurtenances as may from time to time be necessary for the use and operation thereof along and upon the following streets, roads and places in the District of Honolulu....."

The portion of King Street in Palama mentioned in the bill of plaintiff is not included in said list of streets and roads.

Section 3 of said Act provides the nature of the motive power to be used by the grantees of the franchise.

By Section 6 of the Act last aforesaid, it is provided—

"1st. Authority is hereby given the said Association and others to occupy the streets and use the tracks of the Hawaiian Tramways Company, Limited, in accordance with the provisions of Section 3 of Chapter 34 of the Laws of 1884, entitled 'An Act granting to William R. Austin, and his associates, the right to construct and operate a street railway upon certain streets in the city of Honolulu,' provided that the said Association and others shall comply with the provisions and requirements of this Section."

"2nd. Whenever it shall be necessary to cross the tracks of any other railway, the said Association and others are authorized to construct and lay down at their own expense, proper crossings removing the rails so crossed for that purpose; but such construction and removal shall be done in such manner as to

least interfere with the traffic of such other railway; and after the crossings are laid, the expense of maintenance shall be borne equally by the said Association and others, and the owners or lessees of such other railway."

"3rd. In the use of any portion of the tracks of the Hawaiian Tramways Company, the cars of the Hawaiian Tramways Company or of the said Association and others, shall not remain standing on the portion used jointly, but shall make only such stops as are required to take on and let off passengers."

It is further provided by Subdivision 11 of Section 2 of Act 69 of the Session Laws of 1898, that "Whenever a majority of the owners of property on any street or road in said Honolulu shall, in writing, petition said association and others to lay a railway in such street or road, and the Executive Council shall consent thereto, such railway may be laid thereon and thereafter may be maintained and operated for the unexpired term of said franchise."

By the provisions of Section 86 of an Act of the Congress of the United States, entitled "An Act to provide a government for the Territory of Hawaii," approved the 30th day of April, 1900, all of the powers and duties which by the laws of the Republic of Hawaii were conferred upon and required of said Executive Council, not inconsistent with the Constitution and laws of the United States, were conferred upon and required of the Governor of the Territory of Hawaii.

The Honolulu Rapid Transit and Land Company, respondent herein, and a corporation organized and existing under and by virtue of the laws of the Republic of Hawaii, is the successor and assign of Clinton G. Ballentyne and others.

It further appears that ever since the assignment of the rights, privileges and franchises granted to William R. Austin and his associates, to the petitioner herein, to wit: some time prior to the 14th day of November, 1890, the petitioner herein has operated and maintained and still operates and maintains upon the streets of Honolulu, a street railway including the street known as King street therein, and on that portion thereof referred to in said bill.

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That the Rapid Transit and Land Company, after becoming the assignee in interest of Clinton G. Ballentyne and his associates, and after its incorporation on August 31, 1898, began publicly to construct a street railway in Honolulu, the said showing of cause alleging that said respondent "is now and since the 31st day of August last, has been operating a street railway of the type aforesaid through a number of the principal streets of said Honolulu under and by virtue of its said charter."

It is admitted that the Rapid Transit and Land Company had at the time of the filing of the bill herein, commenced to construct and is constructing a street railway along King street for a distance of more than 1700 feet thereon and along that portion thereof westward from Liliha street and referred to in the bill, and in such construction of said portion of said street railway is running parallel to the railway track of the said plaintiff and petitioner.

It is claimed by the respondent that its action in so doing is in conformity with the grant in its franchise (Act 69 of the Session Laws of 1898 aforesaid,) and of a decision of the Supreme Court of the Territory of Hawaii, namely, the case of the *Rapid Transit and Land Co. v. Hawaiian Tramways Company, Limited*, reported in 13 Haw., P. 363, and in response to a petition of a majority of the property owners on said King street, and with the consent of the Governor of the Territory of Hawaii in accordance with law and the regulations of the departments of the territorial government of Hawaii vested with authority in the premises.

The bill of plaintiff claims that the action of the said respondent is in derogation of the prior valid rights of petitioner under its franchise, and that the laying of such tracks will interfere with and impair the beneficial enjoyment of the prior valid franchise of the petitioner.

The jurisdiction of this Court is invoked through allegations in the bill that the charter of the respondent is unconstitutional, null and void, is in conflict with the constitution of the United States of America; and that said charter and each and every

portion thereof is in conflict with the laws of the United States and in particular with that certain Act of the First Session of the Fifty-sixth Congress of the United States approved April 30th, 1900, and entitled "An Act to provide a government for the Territory of Hawaii."

It further appears that W. H. Pain, from the year 1889, has been and now is manager of the business of the said petitioner in the city of Honolulu.

That prior to the filing of the bill in equity herein, to wit: on the 22nd day of January, 1901, in accordance with the provisions of Section 1255 to 1258 inclusive of the Civil Laws of the Territory of Hawaii, a submission of certain alleged facts was made to the Supreme Court of the Territory of Hawaii, and a decision therein rendered by the said Supreme Court on the 25th day of April, 1901, in an action entitled *The Rapid Transit and Land Company v. The Hawaiian Tramways Company, Limited. Supra.*

The facts of the controversy as set forth in the said submission signed by the parties thereto and as appears in the opinion and judgment of the said Supreme Court of the Territory of Hawaii, reported in 13 Haw., Page 363, were as follows:

1. "That the said Tramways Company, as authorized by law, is operating a street railway or tramway in Honolulu, in the Territory of Hawaii, and occupies a single track with switches and turnouts on King street from the Waikiki road to a point near the Government pumping station at Kalihi. Said Tramways Company proposes to lay a double track other than the necessary turnout and switches along said King street and to operate thereon a tramway by electricity.

2. "That the said Honolulu Rapid Transit and Land Company is the lawful holder of a franchise granted to Clinton G. Ballentyne and others by Acts 69 and 70 of the Session Laws of 1898, and having received a petition from the majority of the owners of property on said King street and the Executive Council having consented thereto, for that portion of said King street lying between Nuuau stream and Thomas Square, it

proposes to lay such railway and to operate the same on said street, between said points, the distance between said points being greatly in excess of seventeen hundred (1700) feet."

3. "That no act which could be construed as an act of acceptance of the Act of 1890, was done by the Hawaiian Tramways Company, Limited, until after the expiration of the time limit set out in the Act of 1895."

4. "That in the month of June, 1899, the Hawaiian Tramways Company, Limited, notified the Minister of the Interior of its intention to lay a double track on all the roads covered by its franchise, and inclosed in the notification to the Minister of the Interior a statement of the proposed alignment of the double track on the streets and requested the Minister of the Interior to notify the Company if he had any suggestion to make as to the grade or alignment. About the 25th. day of July, 1899, the Minister of the Interior replied to the Hawaiian Tramways Company, stating that he had no objection to offer to the laying of the proposed tracks and no suggestions to offer as to the grade or alignment, and the Hawaiian Tramways Company, Limited thereupon proceeded with the work, preparatory to laying the double track."

The following are the issues of law:

1. "Has the Hawaiian Tramways Company, Limited, the right to lay a double track along King street as above described?"

2. "Has the Hawaiian Tramways Company, Limited, the right to operate a tramway by electricity?"

3. "Has the Honolulu Rapid Transit and Land Company the right to lay a track on King street for more than 1700 feet?" The judgment of the Supreme Court being that the first of the two last above questions were answered in the negative, and the third question in the affirmative.

Upon the submission in the aforesaid case, Messrs. Kinney, Ballou & McClanahan appeared as attorneys for the Rapid Transit and Land Company, and Messrs. Paul Neumann and

Holmes & Stanley appeared as attorneys of record for the Hawaiian Tramways Company, Limited.

Thereafter, on the 6th day of November, 1901, the date of the filing of the bill herein, a bill in equity was filed in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii by the Hawaiian Tramways Company, Limited, verified by W. H. Pain, as manager of said Company, in an action entitled *The Hawaiian Tramways Company, Limited, v. The Rapid Transit and Land Company*, wherein J. J. Dunne, John T. De Bolt and Thomas Fitch represented the petitioner. The said bill sets up substantially the same facts with the exception of the jurisdictional clause, and prays for substantially the same relief as in the bill herein.

In the bill filed in the First Circuit Court of the Territory, the following sworn allegation appears (the same allegation being substantially set up in the affidavit of said W. H. Pain, filed herein in support of his bill) to wit:

"Your orator further shows that on the 22nd day of January, 1901, a certain purported controversy was attempted to be submitted for decision to the Justices of the Supreme Court of said territory; and that thereafter on March 27th, 1901, a purported 'stipulation to submit additional facts' was sought to be filed in said submission of said purported controversy; and thereafter on the 28th and 29th days of March, 1901, said submission of said purported controversy came on for hearing before said Supreme Court of said Territory; and in this behalf your orator shows that a duly certified copy of said submission and of the pretended proceedings had therein, is attached hereto and is made a part hereof and is marked "Exhibit A." And your petitioner further shows that, thereafter, to-wit: on April 28th, 1901, said Supreme Court acting solely in pursuance to said pretended and purported submission of said pretended controversy, made and gave its decision thereon, which said decision is fully reported"

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"Your petitioner further shows that said pretended submission and all proceedings had therein, and the decision made and given therein and all pretended rights and privileges flowing therefrom, or defined or limited thereby, was and were and are wholly null and void, and of no effect, value or validity whatever; and in this behalf your orator respectfully shows that said Supreme Court was then and there in the matter of said pretended submission of said pretended controversy, and in its decision and judgment there wholly without any authority, power, warrant of law or jurisdiction either to hear or to determine said pretended submission of said pretended controversy; that your orator never appeared in said alleged submission, either in person or by attorney, nor did your orator sign or authorize any person in its behalf to sign or consent to the said pretended submission; that your orator never received, accepted or acknowledged service of process of any character in said alleged submission, either in person, attorney or otherwise; that the pretended appearance in said alleged submission of Paul Neumann, Esq., or of Messrs. Holmes & Stanley, or either of them as attorneys or as counsel for your orator herein, was wholly unauthorized by your orator, and was entirely without either the knowledge or consent of your orator; and that your orator never knew anything concerning said pretended submission of said alleged controversy, until after the said pretended submission had been made and said decision rendered, made and given."

Upon the hearing of the order to show cause, a motion was filed by the Rapid Transit and Land Company, through its attorneys, and upon the affidavit of Clinton G. Ballentyne, for a rule against J. J. Dunne and John T. De Bolt, to show their authority to act as attorneys for the petitioner herein. An order was made by the Court for the said J. J. Dunne and J. T. De Bolt to show their authority to act as attorneys for the petitioner, and also to show their compliance with the provisions of the Civil Laws of the Territory of Hawaii, relative to the filing by foreign corporations of certain documents in the

archives of the territory. In response to said order a voluminous affidavit was filed by W. H. Pain, as manager of the petitioner, together with certain other documentary evidence.

In said affidavit, said Pain alleges the following:

"This affiant further shows that from 1889 to the present time he has been and still is the sole manager and representative of said plaintiff and petitioner, corporation aforesaid, and as such had control, direction and management exclusively of all the transactions of said corporation in said Honolulu, during all the times herein mentioned; and this affiant during all the times herein mentioned and as part of his authority and duties as said manager, had the exclusive control and management of all the business, affairs and transactions of said corporation in Honolulu, and represented said corporation therein including..... the employment and discharge of attorneys and counsellors, control and management of all litigation.....with full power of representation of said corporation in all of said matters and in all matters incidental thereto or connected therewith"

After the introduction of certain oral evidence, these two propositions and the general question of the issuance of a preliminary injunction were argued before the Court and the matter submitted for its decision.

The complainant is a foreign corporation organized under the laws of Great Britain and Ireland. It has no director or other officer, except its manager, W. H. Pain, residing within the jurisdiction of this Court or without the jurisdiction of Great Britain and Ireland. Since 1889, W. H. Pain, as he testifies, has acted as the sole manager of this corporation in these Islands; during this time he has had the exclusive control of all its affairs in this territory, "including the employment and discharge of attorneys and counsellors, and the management and control of all litigation."

Complainant is now seeking for a temporary injunction against respondent, which is allowable only when from a full statement of the facts a permanent injunction might be granted.

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It appears from the facts brought out on the hearing, and as hereinbefore stated, that the complainant and respondent were heretofore parties to certain litigation affecting their charter rights to construct and maintain street railways in the city of Honolulu, and especially in relation to their right to lay a street railway track on King street in the city of Honolulu; and being desirous of settling their differences as to their respective rights to the use of King street in Honolulu, they did, pursuant to Sections 1255 and 1258 inclusive of the Civil Laws of the Territory of Hawaii, on the 22nd day of January, 1901, enter into an agreement whereby their differences were submitted to the Supreme Court of the Territory of Hawaii for its adjudication and which adjudication the parties agreed to abide by. This agreement and statement of facts was originally signed by "Honolulu Rapid Transit and Land Company, by W. R. Castle, and Kinney, Ballou & McClanahan. Hawaiian Tramways Company, Ltd. By Holmes & Stanley, of counsel." And a further agreement or stipulation was also made and executed on the 27th day of March, 1901, which was signed by "Kinney, Ballou & McClanahan, attorneys for the Hon. Rapid Transit and Ld. Co.," and by "Holmes & Stanley, Attys. for Hawaiian Tramways Co., Ltd.," and submitted to the Supreme Court of the Territory of Hawaii, as appears by the Exhibit "A" which is made a part of the affidavit of W. H. Pain, filed in support of his bill in this proceeding.

It also appears from said Exhibit "A," that Clinton G. Ballentyne, as manager of the Honolulu Rapid Transit and Land Company, and W. L. Stanley of Holmes & Stanley, attorneys for the Hawaiian Tramways Company, made oath before Edmund Hart, a notary public, that the controversy "is real and the proceedings in good faith to test the rights of the parties."

The minutes of the clerk of the Supreme Court of the Territory of Hawaii for the 28th day of March, 1901, (a portion of said Exhibit "A") show, that all the attorneys for both sides of said controversy appeared before said Court, and that W. L. Stanley, one of said attorneys for the Hawaiian Tramways Com-

pany, read said agreed statement of facts to the Court and argued the case on the part of said company; that Mr. McClanahan argued the case for the Honolulu Rapid Transit and Land Company, and that on the 29th day of March, 1901, both Mr. Stanley and Mr. Paul Neumann replied to the argument of Mr. McClanahan.

It was also uncontradicted that Mr. Pain was present in the said Supreme Court and listened to the argument made therein at that time, and at no time until the institution of the proceedings in this Court has he objected to said submission on the part of the complainant or even to the decision of the Court.

The case was decided by the Supreme Court of the territory on the 25th day of April, 1901, and that decision remains the law of that case by which the rights of the parties in this case to the use of King street, were settled.

It appears further from the evidence in this proceeding, that from 1889 to the present time, Mr. W. H. Pain has been and still is the sole manager and representative of the said plaintiff and petitioner in this territory, and as such he has had control, direction and management of all the transactions of said corporation in said Honolulu, "including.....the employment and discharge of attorneys and counsellors and the control and management of *all litigation*."

The complainant is now trying to avoid the effect of the decision of the Supreme Court of the territory in the case referred to, alleging that no statement of facts was agreed upon by it or by any person authorized to agree upon such statement of facts, and that it had no knowledge of any such submission, notwithstanding that Mr. W. H. Pain is its exclusive representative here and has the "management and control of all litigation of the company," and is now acting as the manager and representative of the company in instituting the proceeding in this Court; Mr. Pain being also the only person testifying to the effect that complainant is not bound by the aforesaid decision and that the said agreement and statement of facts was without the authority or knowledge of the complainant.

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It has been shown in this proceeding that Mr. Pain was in the Supreme Court during the argument and submission of the facts in that case. He testifies that he was present; and it is uncontradicted that he is the only officer or agent of the corporation in Honolulu. Now, if from 1889 to the present time, Mr. Pain has had the exclusive control and management of all the business of the complainant, "including the employment and discharge of attorneys and counsellors, and the control and management of all litigation," he must have had power to control this litigation, if what he swears to in his affidavit is true. And if he had power to control all of the litigation of complainant from the year 1889, why did he sit quietly by without making a protest to the Court or to any one else on behalf of the company he represented until a final judgment was entered in that case against his company, and not even then? If the attorneys therein were not acting within his authorization, he had the right to discharge them, and it was his duty to his principal to discharge them and to make a summary application to the Court for redress.

He admits he was in Court during the proceedings in the territorial Supreme Court, and he testified on the hearing herein, when examined in relation to the stipulation for submission of further facts in the Supreme Court matter, that "he knew some question arose as to whether they should do something and they did," showing his entire familiarity with the case and the action being taken by the attorneys therein.

"There is no principle of practice better settled in our American law, than that an appearance in Court by an attorney for a client, carries with it the presumption of authority to appear." *Bonnifield et al v. Thorp*, 71 Fed. Rep. 924.

It is always presumed that an attorney appearing and acting for a party to a cause has authority to do so and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence.

Hill v. Mendenhall, 21 Wall U. S. 453; *Osborn v. Bank of United States*, 9 Wheaton, U. S. 741.

And this is especially so in relation to foreign corporations, which can only appear by attorney.

It is clear that managing officers of corporations have power to employ attorneys and counsellors without delegations of power or formal resolutions to that effect. And while Mr. Pain claims that he did not authorize these attorneys, Messrs. Holmes & Stanley or Paul Neumann, Esq., now deceased, to act as the attorneys for the corporation complainant in that case, yet the whole of the proceedings in the case, including the appearance in Court of the manager of the complainant (and its only representative in these Islands) during the proceeding, and the silence of complainant ever since the rendition of the decision, shows that it tacitly admitted to that Court the authority of the attorneys to act in the matter. And again, while Paul Neumann, Esq., has since deceased, yet Messrs. Holmes & Stanley are here, and if the complainant so desired could have had their testimony in this proceeding.

The decision of the Supreme Court, construing the charters of the parties to that action and their respective rights thereunder, including the right to lay the track on King street on the part of respondent herein for a distance of more than seventeen hundred feet thereon, is binding upon this Court in the event there was no Federal question involved.

Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92; *Egan v. Hart*, 165 U. S. 188; *Chicago, Burlington etc., R. R. Co. v. Chicago*, 166 U. S. 116, 242; *Gardner v. Bonestell*, 180 U. S. 362.

It was said in the case of the *Guaranty Trust Co. of N. Y. v. Galveston City R. Co.*, 107 Fed. 311, 320, that:

"We follow the interpretation given to the statutes of a state as appears by the decision of the Supreme Court of the state."

Aberdeen Bank v. Chehalis County, 166 U. S. 440; *Nobles v. Georgia*, 168 U. S. 398; *Fordyce v. DuBose*, 87 Texas, 78.

No federal question appears to be involved in the proceedings before this Court and no argument was presented in favor

of any such question. It is true the petition of complainant alleges that there is a constitutional question involved in that the granting of the franchise to the Rapid Transit and Land Company was in violation of the prior valid rights of the complainant, but I find further in the submission of facts to the Supreme Court that it was admitted that the said "Honolulu Rapid Transit and Land Company is the lawful holder of a franchise granted to Clinton G. Ballentyne and others by Acts 69 and 70 of the Session Laws of 1880...."

Can the complainant, after admitting in one Court of competent jurisdiction the lawful holding of a franchise by the respondent, and having the case tried upon that theory, then come into another Court of different jurisdiction, and deny the validity of that franchise in an attempt to invoke the jurisdiction of that other Court in a proceeding in equity? This Court will not consider such an attempt.

It does not seem necessary to pass upon the question whether the complainant has complied with all the statutes of the Territory of Hawaii in relation to foreign corporations, in rendering the decision in this matter.

One of the questions submitted to the Supreme Court of the territory as appears from the foregoing statement of facts is:

"Has the Honolulu Rapid Transit and Land Company the right to lay a track on King street for more than seventeen hundred feet?"

To which inquiry the Supreme Court, after an exhaustive inquiry into the various statutes and franchises under which the two parties were acting, decided in the affirmative. And that is substantially the only question now before this Court, and which has been settled by the decision of the Supreme Court of the territory.

This Court will not listen to a collateral attack made in this case upon a judgment of the Supreme Court of the territory.

It is an established principle of equity jurisprudence, elementary in its nature, that "he who seeks equity must do equity." And that he who asks equitable relief must come into Court

with clean hands. The complainant has not come into this Court with clean hands.

Galligher v. Cadwell, 145 U. S. 368; *Whitney v. Fox*, 166 U. S. 637; *Penn. Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 698.

Messrs. Dunne and De Bolt, attorneys for the complainant, this Court holds are properly authorized to act in this proceeding, yet from all the facts there has not been such a showing made as will entitle this Court to assume jurisdiction in this matter, or entitle the complainant to any equitable relief herein. The preliminary injunction is denied, and the bill dismissed with costs.

UNITED STATES OF AMERICA *v.* ESTATE OF BERNICE PAUAHI BISHOP, deceased, and JOSEPH O. CARTER, *et al.*, Trustees under the will of BERNICE PAUAHI BISHOP, deceased; OAHU RAILWAY AND LAND COMPANY, LIMITED, a corporation; THE DOWSETT COMPANY, LIMITED, a corporation; THE HONOLULU SUGAR COMPANY, a corporation; HONOLULU PLANTATION COMPANY, a corporation; CHOW AH FO, JOHN II ESTATE, LIMITED, a corporation; WILLIAM G. IRWIN, OAHU SUGAR COMPANY, LIMITED, a corporation; BISHOP & COMPANY, a copartnership.

DATED: DECEMBER 12, 1901.

1. Under the Federal Constitution, private property cannot be taken for public uses without just compensation.
2. Just compensation means compensation that is just to both sides, just in regard to the public as well as to the individual.
3. Whenever private property is taken for public uses or purposes, the fair market value of the property at the time of the taking should be paid for it.
4. The actual value of the property at the date of the summons is designated as the measure of valuation of all property to be condemned, under the Hawaiian Statute.

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5. A fair equivalent for any entire piece of property is its market value in money, which value must be shown by the usual and common means.
6. What property sought to be condemned will bring at a fair public sale where one party wants to sell and another wants to buy, may be taken as a criterion of its market value.
7. The probable value of land for residential purposes, or for the purposes of a public resort, cannot be considered, in the absence of any evidence of residences on said land, or that the same was ever used for a public resort.
8. Burden of proof is on the plaintiff to prove the value of interest of defendant in the lands sought to be condemned.
9. The evidence of experts as to values does not differ in principle from the evidence of experts upon other subjects.
10. In considering the opinions of experts, the jury is not bound to give weight to testimony which is contrary to what every person of good sense and ordinary intelligence knows to be true.
11. Knowledge obtained by the jury through a personal inspection of the lands in controversy may be used only in determining the weight of conflicting testimony as to the value of the land, but not otherwise.
12. While the jury cannot act upon material facts resting only within its private knowledge, but must be controlled by the evidence adduced, the members of the jury should yet judge of the weight and force of that evidence by their own general knowledge of the subject.
13. Compensation in this case is to be estimated by the actual rights acquired by the government, and not by the use which the government may make of these rights.
14. The actual value of the property to be condemned cannot be enhanced by reason of any projected improvements for which it is sought to be taken.
15. Willingness or unwillingness of defendant to part with its property is not a proper element of value.
16. Prospective or speculative values not to be considered.
17. The value of leases on the land to be condemned is not to be considered in arriving at the true market value of the fee in the land.
18. Sworn returns of the value of said lands made to the Assessor of the territory by the defendant are admissions against interest, and are competent evidence tending to show the market value of the property at the time of the making of the said sworn returns.
19. Improvements on land sought to be condemned are to be assessed separately from the value of the land itself.
20. In determining on which side the weight or preponderance of the evidence is, the jury should consider the opportunities of witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack

of interest in the result of the suit, and the probability or improbability of the truth of their several statements in view of all the other evidence adduced on the trial.

21. All the evidence in the case, both direct and circumstantial, must be taken into consideration, together with all reasonable inferences to be drawn from such evidence.

EMINENT DOMAIN.

Action brought to condemn certain lands under the provisions of an Act of Congress dated August 1, 1888, entitled "An Act to authorize the condemnation of land for sites of public buildings and for other purposes."

J. J. Dunne, Assistant U. S. District Attorney, for the government.

Kinney, Ballou & McClanahan and *Holmes & Stanley*, for defendant, Estate of Bernice Pauahi Bishop, deceased, and Joseph O. Carter, *et al.*, Trustees under the will of Bernice Pauahi Bishop, deceased.

Bishop Estate Case.

CHARGE TO THE JURY.

ESTEE, J. This action is brought under the provisions of an Act of Congress of the United States, dated August 1, 1888, entitled "An Act to authorize the condemnation of land and for sites of public buildings and for other purposes". (Vol. 25 U. S. Stats. P. 357).

The special lands sought to be condemned are certain lands situate in the District of Ewa, in and about the Harbor of Pearl Lochs, sometimes called Pearl Harbor, in the Island of Oahu, in the Territory of Hawaii.

The United States of America seeks to condemn these lands and to acquire a fee simple estate therein, for a public use, to wit: for the purpose of erecting and maintaining thereon a

Naval Station and channel defense for the uses and purposes of the United States of America, and of the Navy Department thereof, and for the improvement of the harbor and channel leading thereto, known as Pearl Lochs, sometimes called Pearl Harbor; together with the erection and maintenance upon said tracts and parcels of land of all such public buildings, magazines, arsenals, navy-yards, light-houses, quarantine stations, wharves, docks, piers, canals, roads, ditches, flumes, aqueducts, pipe-lines, cemeteries and sewers as may be proper or necessary to or for the efficient maintenance of said Naval Station and harbor and channel defense, for the uses and purposes of the United States government therein and of its said Navy Department.

Among the tracts and parcels of land sought to be condemned by the said United States government in this action, are certain lands belonging to the Estate of Bernice Pauahi Bishop, deceased, which are shown on that certain map known and designated as Hawaiian Government Survey Registered Map No. 1739, said lands being in two portions, "A" and "B" particularly described as follows:

Portion "A": Commencing at a point on the shore on the eastern side of the channel which leads into Pearl Lochs, where the northern shore of the second fish pond below Keanapuaa Point as shown on Chart No. 1800, published by the Hydrographic Office of the United States Navy Department, joins the low water mark of the said channel; thence following the shore to the northward, along the line of low water mark to the said Keanapuaa Point or Keanapuaa as marked on said chart; thence following the shore along low water mark in a general easterly direction to what is shown on said chart as south-east loch, and along the low water shore line of south-east loch to the point in the northern arm of south-east loch where the low water shore line touches the wall shown on the said chart as extending in a south-easterly direction from the south-east corner of Loko Kuana; thence in an easterly direction along said wall to its end;

thence east, magnetic, to the line of the Oahu Railway; thence across said railway and in the same direction, to wit: East magnetic, eight hundred (800) feet distant from the center of the said railway line to a point; thence south 22 1-2 degrees east magnetic to the general southern boundary line of the Estate of Bernice Pauahi Bishop, deceased, sometimes called B. P. Bishop Estate, as shown on the aforesaid Hawaiian Government Survey Registered Map No. 1738; thence along the said boundary line in a southwesterly direction to where the said boundary line touches the said Oahu Railway, and partly across the said railway in the same direction to its center line; thence still in a southwesterly direction, but more westerly, across the said railway, and continuing in the same direction to a point at about the middle of the Eastern shore of the said second fish pond below the said Keanapuaa Point; thence along the shore of the said fish pond to the northward and to the westward to the point of commencement; comprising to high water mark about six hundred and thirty-five (635) acres more or less; together with all water, riparian, fishing and other rights and rights of way and other easements, incidental or appurtenant to the said portion "A".

Portion "B". The whole of that certain Island shown upon the aforesaid Hydrographic Office Chart No. 1800, and known and designated as Kuahua, to low water mark and comprising to high water mark, about 41.5 acres more or less, together with all water, riparian, fishing and other rights and rights of way, and other easements, incidental or appurtenant to said Portion "B".

The question before you then is what is the market value of these lands with the appurtenances, and what is the just compensation to be paid by the United States government to the owners thereof, namely; the Estate of Bernice Pauahi Bishop, deceased, and that just value you are to assess in this case.

You are aware that private property cannot be taken for public use without "just compensation". This is the language of our fundamental law, the Federal Constitution (Article 5 of

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the Amendments of 1791); and from this language you will observe that the compensation spoken of must be just. In this behalf I charge you that it is your duty, to treat both sides of this case with equal fairness and impartiality, and to avoid giving to one side any preferment or advantage denied to the other.

In other words, when dealing with this matter of compensation, you are to remember that "just compensation" means compensation that is just to both sides, just in regard to the public as well as to the individual. You are not, for instance, to place an unduly depreciative valuation upon this property because the government desires it; nor should you place an exaggerated valuation upon the property either because it is private property, or because the government may desire it.

Your province is to proceed and act throughout with even handed fairness and impartiality, treating both sides alike and deciding disputed questions solely upon the evidence received within the lines laid down by this charge, you being the sole judges of the weight of the evidence introduced.

I instruct you that whenever private property is taken for public uses or for public purposes, the fair market value of the property at the time of the taking should be paid for it; and according to the statute of this territory, the actual value of the property at the date of the summons is designated as the measure of valuation of all property to be condemned; and I charge you that the date of the summons in this case is July 6th, 1901.

It is to this date, therefore, that you are to look in fixing the value of the property involved in this case. You are to remember that the material consideration is the actual condition of the property as it stood on that date. It is to this that you are limited. The prospective or speculative value of the land from possible improvements or prospective uses, can not be considered by you; the value must be actual, and not speculative or mere possible value.

It is not proper, therefore, to consider how the property might

be improved or the cost of such improvements; nor can you consider what the probable value of the land would be if this or that improvement were placed upon it; nor can you consider the intention of the owner to make improvements, even though you should find such intention to exist. In brief, you are to limit your consideration to the actual condition of this property as it actually stood on July 6th, 1901.

A fair equivalent for any entire piece of property is its market value in money.

The burden of proving the market value of the interest of the defendant in the lands in question is upon the plaintiff; in other words, the claim of the plaintiff as to the amount of compensation to be awarded defendant must be proven by the plaintiff by a preponderance of the evidence.

The Island of Kuahua is admitted by the pleadings to be an independent and separate tract of land and to be no part or portion of any other tract of land, and therefore in assessing compensation for the taking of said Island, you will not deduct from such compensation the value of any betterments or benefits whatsoever. In other words, you must award to the defendants for said Island, its full market value as of the sixth of July, 1901.

In fixing the value of Kuahua Island, you are to consider all the testimony bearing upon its market value on the said 6th day of July, 1901, but you are not to consider an extreme, speculative value if any such has been given in the testimony. It has been testified by one witness for the defendant that the Island was worth three thousand dollars an acre for residential purposes or for the purpose of a public resort. In considering that testimony you are to bear in mind that it nowhere appears in the testimony that there were any residential or other structures on the Island of Kuahua at the date of the commencement of this suit, or that the said Island was ever used for residence purposes or as a resort; but there is testimony to the point that this Island is surrounded by a lagoon and not by the open sea, and that the climate there is excessively hot.

It is your province under the testimony of the witnesses whose opinions have been given upon the subject of the value to consider the same by reference to the whole situation of the property, and its surroundings, and all the attendant circumstances by applying to all the circumstances, your own knowledge and general experience. The evidence of experts as to values does not differ in principle from the evidence of experts upon other subjects. So far from laying aside your own general knowledge and ideas, you may apply that knowledge and those ideas to the matters of fact in evidence, in determining the weight to be given to the opinions expressed. And while the jury cannot act in any case, upon particular facts material to its disposition, resting only within their private knowledge, but should be governed by the evidence adduced, yet they should judge of the weight and force of the evidence by their own general knowledge of the subject; and while great weight should always be given to the opinions honestly and candidly expressed of those familiar with the subject, they are yet to be intelligently examined by the jury, in the light of their own personal knowledge, giving them force and control only to the extent that they are found to be reasonable. (*Head v. Hargrave* 105 U. S. 45, 49.)

In brief, the jury is not bound to give weight to testimony which is contrary to what every person of good sense and ordinary intelligence knows to be true.

The object of this trial is to find out, as I have stated, what was the market value of the land described belonging to the Estate of Bernice Pauahi Bishop, deceased, on the 6th day of July, 1901. It is usual for juries to try and reconcile conflicting testimony if it is possible to do so. In this case, it would seem difficult to do this as the divergence among the witnesses on the question of value is so great.

Some of complainant's witnesses testified that the land as a whole was worth fifty dollars an acre; while four of the witnesses for defendant testified that some 350 acres of the land sought to be condemned was of the value of \$300 an acre for

raising cane. Several of the witnesses for defendant fixed the value of a portion, three hundred feet deep by thirteen thousand feet frontage on the lagoon, at from \$1000 to \$1500 an acre; and one witness testified that Kuahua Island, consisting of about forty-one acres in round numbers, was worth \$3000 an acre.

In reaching your verdict therefore, you must consider all phases of the case and all the testimony. You are to assume that all witnesses are honest until the contrary appears; but in all events, you are to be the judge of the weight and character of the testimony. To do this you must analyze the testimony and from such analysis make your verdict.

It will be your duty, however, to attempt as far as possible to reconcile conflicting testimony on this question of value; and in attempting to so reconcile this conflict, you should consider carefully the theories presented by each witness, and upon which he bases his opinion. Observe if the witnesses have unduly exaggerated or diminished the value of the land in arriving at their estimates and note if the theories upon which the witnesses on either side have proceeded are sound or unsound. In doing this you may be able to reconcile conflicting statements of testimony and be able to arrive at a just estimate of the value of this land.

One thing you should bear in mind, that the market value of this land on July 6th, 1901, must be shown by the usual and common means adopted for such purpose, and no mere speculative valuations are to be considered by you.

In determining upon which side the preponderance of evidence is, you should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified, their conduct and demeanor while testifying, their interest or lack of interest if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence adduced, or circumstances proved on the trial, and from all the circumstances determine on which side is the weight or preponderance of the evidence. In dealing with the testimony, you must not

forget by whom it was given, the motive of the particular witness if any, the purpose by which he is actuated, the partisanship if any, attributable to him; indeed, any fact or circumstance by which his unbiased utterance of truth might be impeded or prevented altogether, must receive your attention. You are seeking the truth.

Thus you would not, as men of sense, so readily yield to the testimony of a witness whose partiality is known or observable, as you would have done had the same witness been wholly indifferent between the parties and with no partisan motive to actuate him—no interest in the result of the trial other than the general interest which every good citizen ought to feel, that in this as in all other trials, justice must be done according to law.

By a preponderance of the evidence is not meant, gentlemen, the evidence given by the greater number of witnesses, but the superior strength of such evidence and the greater weight which such evidence may have in your judgment.

Gentlemen of the jury, early in the trial, you visited the lands, sought to be condemned. The object of such visit was that you might acquaint yourself with the physical conditions and characteristics, and the nature and extent of the land so as to better enable you to understand the evidence on the trial of the case. The knowledge so acquired may be used by you in determining the weight of conflicting testimony respecting the value of this land, but not otherwise.

I have told you that the fair market value of the property as that property actually stood on July 6th, 1901, should be paid for it; and in this behalf I charge you that what this property would bring at a fair public sale, where one party wants to sell and another wants to buy may be taken as a criterion of its market value. But you must understand that compensation is to be estimated in this case by the actual rights acquired by the government, and not by the use which the government may make of these rights; and therefore, I instruct you, that the fact that this property may be desired by or necessary to, the

government, is not to be considered by you in fixing compensation.

I further instruct you that the actual value of this property cannot be enhanced by reason of the projected improvement for which it is taken; for this would simply be to make the government pay for an enhancement caused by its own work. And moreover, the willingness or unwillingness of the Bishop Estate to part with its property is not a proper element of value; nor can you consider what the Bishop Estate would give rather than be deprived of this property. As I have heretofore said, you will, in determining compensation, limit your attention to the market value of the property as it actually stood on July 6th, 1901, and be guided solely by that.

Some evidence has been introduced by the government showing certain valuations sworn to and filed with the Assessor, pursuant to the requirements of the territorial statute in that regard. Upon this subject I charge you that such sworn returns to the Assessor are called by law, admissions against interest and are competent evidence tending to show the value of the property referred to therein at that time. You may therefore, and indeed it is your duty to consider such returns along with the other evidence in the case bearing upon the question of value, of this property.

I instruct you also, that the option given by the defendants to the United States for a portion only of the property now condemned, subject to existing leases held by the Honolulu Sugar Company, is to be considered by you only along with all other evidence bearing on the market value of the property condemned. Your duty is to determine by your verdict the real and true market value of the land in question on July 6th, 1901, by considering all the evidence bearing on that point.

The leases referred to in the trial of this case have nothing to do with the value of the interest of the Estate of Bernice Pauahi Bishop, deceased, in this land.

The values of those leases are to be determined in the near future by this Court in another trial. You cannot settle the

DECEMBER, 1901.

value of the interest of the Bishop Estate therefore in the land in question by any reference to these leases; therefore I instruct you to disregard said leases entirely, in arriving at the value of the interest of the Bishop Estate in this land.

Gentlemen, in arriving at a verdict in this case, you are to give to the testimony such weight and effect as in your judgment it deserves; but you should not treat such testimony arbitrarily or capriciously nor should you limit your consideration to any isolated or fragmentary part thereof. On the contrary, you are to take into consideration, all the evidence in the case both direct and circumstantial, together with all reasonable inferences to be drawn from that evidence.

In rendering your verdict you will assess by itself, and as a separate item, the market value on the 6th day of July last, of any improvements that you may find from the evidence to have been on the condemned premises at that date.

I further charge you, that no direct and special benefit or benefits to that portion of defendant's land not taken have been proven in this case, and you will therefore in arriving at the market value of the portion taken, make no deduction therefrom for benefits to the part not taken.

Gentlemen of the jury, in arriving at a verdict in this case, it must be by the unanimous assent of all your members.

Under the pleadings in this case, the complainant is entitled to the condemnation of the land described, and you must find a verdict in favor of the defendant for the market value of the lands so condemned; because as I have heretofore stated, under the Constitution of the United States, private property cannot be taken for a public use unless just compensation is paid therefor.

I again finally instruct you that you are to be the sole judges of the facts in the case.

IN THE MATTER OF THE ESTATE OF PAUL J. VOELLER, an involuntary bankrupt.

DECIDED: JANUARY 6TH, 1902.

1. Either one of three conditions must exist to give the United States District Court jurisdiction to adjudge a person a bankrupt, namely: (1) He must either have had his principal place of business, resided or had his domicile within the territorial jurisdiction of the Court for the preceding six months or the greater portion thereof; or (2) while not having had his principal place of business or had his domicile within the United States, have property within the territorial jurisdiction of the Court; or (3) have been adjudged a bankrupt by a court of competent jurisdiction without the United States and have property within the jurisdiction of the Court.
2. The law presumes the domicile of origin to still exist in the absence of any proof of change of domicile.
3. The burden of proof is on the party alleging the change of domicile.
4. The Territorial Courts and the District Courts of the United States do not have co-ordinate or concurrent jurisdiction in bankruptcy proceedings.
5. A bankruptcy proceeding is in the nature of a proceeding *in rem*.
6. The province of the bankruptcy court is to marshal the assets of the bankrupt wherever they may be, so that there may be a proper administration upon his estate, and also that there may be a fair and just distribution thereof to his creditors entitled thereto; and in so marshalling said assets, the Court has full power to restrain any State or Territorial Court or officer from disposing of any of said assets until the adjudication of the debtor as a bankrupt or the dismissal of the petition.
7. It was the intention of Congress in passing Subdivision f of Section 67 to prevent any creditor of an insolvent debtor from obtaining any advantage over other creditors by legal proceedings during a period of four months prior to the filing of the petition in bankruptcy, whether voluntary or involuntary; and all liens so obtained are dissolved by the adjudication in bankruptcy.
8. Where it appeared that while the alleged bankrupt had formerly resided in the Territory of Hawaii, he had not had his principal place of business nor resided therein for the greater portion of six months preceding the filing of the petition in bankruptcy, having left the Territory three years before while a warrant was out for his arrest as a fugitive, and where it further appeared that the

wife and children of the alleged bankrupt are still residing in the Territory, and that he owns certain real property in the city of Honolulu, Territory of Hawaii, and no proof having been adduced on the hearing that the said alleged bankrupt had acquired a domicile beyond this Territory; upon objections filed to the making of an order of adjudication in bankruptcy on the ground that the Court had not obtained jurisdiction under Section 2, Subdivision 1, Chapter 3 of the Bankruptcy Act, *Held*, that no proof of change of domicile having been made, the law presumes the domicile of origin to still exist; but assuming that the domicile of origin no longer exists, the debtor has been shown to have real property within the territory owned by him, which is sufficient to enable this Court to assume jurisdiction, as a bankruptcy proceeding is a proceeding *in rem*, and this Court has jurisdiction of the *situs*.

9. On November 9, 1901, a petition was filed by certain creditors of one Voeller to adjudicate him a bankrupt. The act of bankruptcy complained of was a preference by legal proceedings obtained by a judgment against said Voeller in the Circuit Court of the First Judicial Circuit of the Territory, on the 14th of October, 1901. Execution issued on said judgment, and the real property of said Voeller was levied upon by the Sheriff of the Territory of Hawaii and advertised for sale on the 20th day of November, 1901. Upon application of petitioning creditors, a restraining order was issued out of this Court, directed to the Sheriff of Hawaii, enjoining him from selling said property until the further order of the Court, and directing him to appear before the Court on the 22nd day of November to show cause why the said property should not be turned over to the United States Marshal, and also to show cause why he should not be restrained from selling said property until after the hearing of the petition in bankruptcy. The day set for the hearing of this order to show cause was continued until the 3rd day of January, 1902, when both the petition in bankruptcy and said order were heard. Upon objections interposed to the jurisdiction of this Court to issue said restraining order, made on behalf of the judgment creditor and the Sheriff of the Territory of Hawaii; *Held*: The United States District Court has power to issue the restraining order complained of in this case under Section 2, Subdivision 15 of the Bankruptcy Act of 1898, giving courts of bankruptcy, in addition to the jurisdictional powers specifically enumerated elsewhere in the Act, "the power to make such orders, issue such process and enter such judgments * * * as may be necessary for the enforcement of the provisions of this Act."

IN BANKRUPTCY.

Petition to adjudicate in an involuntary proceeding.

Order to show cause on restraining orders directed to A. M. Brown, Sheriff of the Territory of Hawaii.

J. Alfred Magoon and T. I. Dillon, for petitioning creditors.

Kinney, Ballou & McClanahan and *H. A. Bigelow*, for judgment creditor and A. M. Brown, Sheriff.

ESTEE, J. On November 20th, 1901, a petition duly verified, was filed herein by three of the creditors of one Paul J. Voeller, alleging among other things, that the said Paul J. Voeller "has for the greater portion of six months next preceding the date of the filing of this petition, had his domicile at Honolulu and has property in the city of Honolulu aforesaid subject to execution, and owes debts to the amount of \$2729.73."

Said petition also sets up the nature and character of their provable claims showing that the same amount in the aggregate, in excess of securities held by them, to the sum of five hundred dollars.

Among the other allegations of said petition it appears that one J. J. Byrne had obtained a preference by legal proceedings whereby said J. J. Byrne had on the 14th day of October, 1901, obtained a judgment against said Paul J. Voeller, in the Circuit Court of the First Judicial Circuit of this Territory, in the sum of \$650.90, and had procured execution to be issued under the said judgment, and under which execution the property of said Paul J. Voeller had been levied upon and advertised to be sold and disposed of under said execution on Wednesday, the 20th day of November, 1901, at 12 o'clock m.

Upon the showing made by said petition and affidavit this Court issued an order to the High Sheriff of the Territory, A. M. Brown, directing and ordering him to desist from and enjoining and restraining him from selling the property of the said Paul J. Voeller and every part thereof until the further

order of this Court; and directing the said High Sheriff as aforesaid to be and appear at the Court room of this Court on Friday, the 22nd day of November, 1901, at 10 o'clock a. m., to show cause if any he had, why the said property of the said Paul J. Voeller should not be turned over to the United States Marshal for the Territory of Hawaii, and also to show cause why he should not be enjoined and restrained from selling or exposing said property for sale until after the hearing upon the said petition herein.

Upon the day set for the hearing of the petition and order to show cause, postponed until the 3rd day of January, 1902, J. J. Byrne, the judgment creditor aforesaid, and A. M. Brown, the High Sheriff, appeared by their attorneys, Messrs. Kinney, Ballou & McClanahan and H. A. Bigelow, and opposed any action by this Court in the matter upon the following grounds:

1. That this Court had no jurisdiction, as the said Paul J. Voeller is not now nor has he ever been for the six months preceding the date of the petition, either a resident or domiciled within the jurisdiction of the Court; nor had he his principal place of business within the jurisdiction of the Court as required by Subdivision 1, Chapter 2, Section 2 of the Bankruptcy Act of 1898.

2. That this Court had no jurisdiction to remove the property in the hands of the High Sheriff of the Territory under the judgment hereinbefore referred to.

. First. Section 2 of Chapter 2 of the Bankruptcy Act, after providing for the Courts of bankruptcy, confers upon them jurisdiction to: 1. "Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions, for the preceding six months or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions"

It is apparent therefore, that either one of three conditions must exist in order to enable this Court to have jurisdiction to adjudge a person a bankrupt to wit:

1. The person adjudged to be a bankrupt must either have had his principal place of business, resided, or had his domicile within the territorial jurisdiction of the Court for the preceding six months or the greater portion thereof; or
2. While not having his principal place of business, resided or had his domicile within the United States, have property within the jurisdiction of the Court; or
3. Have been adjudged a bankrupt by a court of competent jurisdiction without the United States and have "property within their jurisdictions."

The petition in this case shows on its face two grounds of jurisdiction:

1st. That Paul J. Voeller of Honolulu, Island of Oahu, Territory of Hawaii, has for the greater portion of six months next preceding the date of the filing of this petition, had his domicile at Honolulu aforesaid; and (2) has property in the city of Honolulu aforesaid, subject to execution; and owes debts to the amount of two thousand seven hundred and twenty-nine and 73-100 dollars (\$2729.73). Either of which two grounds if borne out by the facts adduced at the hearing would be sufficient to give this Court jurisdiction.

It was testified to upon the hearing that Voeller had formerly lived here in Honolulu; that he owned certain real estate in this city; that he was suffering from leprosy and a warrant was out for his arrest, and to avoid arrest he left the Islands some three years ago; that he left his wife and children here in the Islands and they are still resident here; that he was known to be in California at one time but was afterwards believed to have gone to Japan. The judgment creditor contends that the said Voeller left here never intending to return, and that he has therefore lost his domicile in the Islands. It has been held that "A man's domicile, as the word implies, is his house, his home; and it may continue to be such for years without being actually

inhabited by him.....domicile as a question of fact is often one of great difficulty to determine. Yet, in contemplation of law, every one has a domicile somewhere, because upon it generally depends his personal status, rights and duties and the disposition of his property after his death. *Abington v. North Bridgewater*, 23 Pick. 176; *Mitchell v. The United States*, 21 Wall. 351; *Desmare v. The United States*, 93 U. S. 609. Furthermore, a person, who, in contemplation of law, has a domicile, may, nevertheless, as a matter of fact be a mere wanderer and not an inhabitant of any place." *Holmes, administrator, v. Oregon and California Ry. Co.*, 5 Fed. 523-527.

"Where a change of domicile is alleged, the burden of proof rests upon the party making the allegation." *Desmare v. The United States*, 93 U. S. 605-610; *Nixon v. Palmer*, 10 Barb. (N. Y.) 175; *In re Filer*, 108 Fed. 209.

There was not the slightest proof adduced on the hearing of this matter that Voeller had acquired a domicile beyond this Territory, and until such proof is made the law presumes his domicile remains in the Territory. The fact that he left because he was in danger of arrest as a leper gives added force to this proposition. *Morris v. Gilmer*, 129 U. S. 315; *Cobb v. Rice*, 130 Mass. 231-235, where the Court says: "That, at the time of the adjudication and assignment he (the bankrupt) was merely a fugitive from justice who has gained no domicile elsewhere; and therefore he remained a resident within the jurisdiction of the District Court in this District and liable to be proceeded against in bankruptcy.....His domicile being here, continues until he acquires one elsewhere." *Desmare v. United States*, Supra.

"A change of domicile must be clearly shown." *Gravillon v. Richard's Executor*, 33 Am. Dec. 563, (13 La. 293.)

But conceding that the petitioning creditors have failed to show that Voeller had a domicile within this territorial jurisdiction for the six months preceding the filing of the petition yet it clearly appears that he has property within this jurisdiction and subject to the jurisdiction of the court, to-wit,

certain real estate set forth in the schedule attached to the petition and estimated to be of the value of some two thousand dollars. This would, independently of the provision of domicile or residence, bring him within the purview of the bankruptcy jurisdiction of this Court.

The essential facts which give a court jurisdiction of bankruptcy proceedings appearing affirmatively and distinctly in this proceeding, I am therefore of opinion that unless some other reasons are given why said Voeller should not be adjudged a bankrupt, the petitioning creditors are entitled to an order adjudging him such.

Second: Upon the second objection raised by counsel to the jurisdiction of this Court, namely, its power to issue the restraining order to the High Sheriff of the Territory, it is clear that the Court was fully within its jurisdictional powers when it issued said order, and it is not a fact that the Territorial Courts and the District Courts of the United States have concurrent or co-ordinate jurisdiction in bankruptcy proceedings.

"When the bankruptcy law cannot be properly administered by the court having jurisdiction, in consequence of the interference of a state court and its determination to adjudicate upon the rights of the parties and property in the bankruptcy court, the latter ought not to hesitate to assert its authority; for in this matter the courts of the United States and the courts of the state are not of co-ordinate authority but the Federal Court is superior." *In re Miller*, Fed. Case No 9, 551; (6 Biss. 30.)

It would seem quite unnecessary to state, were it not for the point raised by counsel's brief, that the United States District Courts are made courts of bankruptcy and "are invested with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms....." Section 1, Subdiv. 2, and Section 2 of the Bankruptcy Act of 1898. And are given jurisdiction "to appoint receivers and marshals, upon application of parties in interest.....to take charge of the property of bankrupts after the filing of the petition and

until it is dismissed or the trustee is qualified." Section 2, Subdivision 3 of said Act. And in addition to the jurisdictional powers specifically enumerated, it is further provided that this Court shall have "power to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." (Sec. 2, Subdivision 15.)

Indeed it has been held that a bankruptcy proceeding is in the nature of a proceeding *in rem*; the acquisition of jurisdiction is based upon the taking possession by the Court of the debtor's whole property and effects, and upon its adjudication as to his *status*. Hence the Federal Court in which the bankruptcy proceedings are commenced, has jurisdiction of the debtor's whole estate wherever situate. *Markson v. Heaney*, Fed. Case No. 9098. (1 Dill. 497.)

It is further provided by Subdivision f. of Section 67 of the Act, that: "All levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same."

The decisions construing this Section are clearly to the effect that it was the intention of Congress by the aforesaid Section to prevent any creditor of an insolvent debtor from obtaining any advantage over other creditors by legal proceedings during a period of four months prior to the filing of a petition in bankruptcy, whether voluntary or involuntary, and that all such liens are dissolved by the adjudication. *In re Richards*, 96 Fed. 935-939; *In re Kenney*, 105 Fed. 897-898; *Bear, et al., v. Chase*, 99 Fed. 920; *St. Cyr v. Daignault, et al.*, 103 Fed. 854; *In re Blair*, 108 Fed. 529-530; *In re Lesser, et al.*, 108 Fed. 203.

The province of the bankruptcy court is to marshal the assets of the bankrupt so that there may be a proper administration

upon his estate, and also that there may be a fair and just distribution thereof to his creditors entitled thereto; and in so marshaling the assets of said estate, the Court has full power to restrain any state or territorial court or officer from disposing of any of said assets until the adjudication of the debtor as a bankrupt or the dismissal of the petition.

The provisions of the bankruptcy act of 1867 and which Act was in force prior to the passage of the Act of 1898, are practically the same as the latter Act so far as the jurisdiction of the Court of bankruptcy is concerned; and there are numerous cases to be found where the United States Courts are sustained in their exercise of the power to restrain all proceedings in state courts affecting the disposition or sale of the property of a debtor pending the decision of the District Court upon the question of his bankruptcy. This is done so that the rights of all parties may be preserved until the proper court can administer upon the estate of the bankrupt or dismiss the petition, as the facts upon the hearing may disclose to be necessary.

In the case of *In re Mallory*, 1 Sawyer, 88-98 (Fed. Case No. 8991) afterwards affirmed by Judge Field on appeal to the Circuit Court of the Ninth Circuit, it was held that the District Court had power to restrain the State Court in a case similar to the case at bar, and in a well considered opinion the Court said:

"In voluntary cases, the filing of the petition is an act of bankruptcy, and the debtor at the same time surrenders all his estate and effects for the benefit of his creditors and is forthwith adjudged a bankrupt. The District Court is thus clothed at once in voluntary cases with jurisdiction over the debtor and his property. But where the proceeding is involuntary, the debtor is not adjudged a bankrupt until the return and hearing of the order to show cause, and may not be then if he have a sufficient defense. There is therefore good reason for giving the Court power to enjoin between the time of filing the creditor's petition and the return of the order to show cause, as there is in these cases no voluntary surrender of the property,

and the title cannot vest in the assignee until after adjudication."

See also the case of *Blake, Moffitt & Towne, et al., v. Francis Valentine Co., et al.*, 89 Fed. 691, (9th Circuit) where the Court held: "A District Court of the United States as a court of bankruptcy, under the Act of July 1, 1898, has the power to enjoin the sale of property of a debtor under process from a state court * * *

The Court further holding that a District Court had the power to take and "preserve the property until the time arrives when a petition in bankruptcy under the Act may be filed against him, where it is shown that such process is the result of an act of bankruptcy committed by the debtor since the passage of the act in suffering one creditor to obtain a preference through legal proceedings." *In re Kimball*, 97 Fed. 29.

See also the decision of this Court rendered in the matter of the bankruptcy of Lum Man Suk, decided September 20th, 1901. (I)

I am therefore of opinion:—

1. That the judgment creditor has not shown such proof of a change of domicile by the debtor as to prevent this court from assuming that the domicile of origin still exists.

2. Assuming that the domicile of origin no longer exists, yet it is clear that the debtor has property within the territorial jurisdiction of the Court, which fact is sufficient to enable this Court to assume jurisdiction, as a bankruptcy proceeding is a proceedings *in rem*, and this Court has jurisdiction of the *situs*.

3. It is the order of this Court that the prayer of the petitioner be granted and the said Paul J. Voeller be adjudged a bankrupt.

4. That the restraining order heretofore issued in this case was properly issued and the said A. M. Brown, High Sheriff of the Territory of Hawaii, is directed to turn over to the United States Marshal all property in his possession or under his control belonging to the said Paul J. Voeller.

NOTE: See ante *In re Lum Man Suk*, P. 135.

UNITED STATES OF AMERICA *v.* ESTATE OF BER-NICE PAUAHI BISHOP, deceased, and JOSEPH O. CARTER *et al.*, Trustees under the will of BERNICE PAUAHI BISHOP, deceased; OAHU RAILWAY AND LAND COMPANY, LIMITED, a corporation; THE DOWSETT COMPANY, LIMITED, a corporation; THE HONOLULU SUGAR COMPANY, a corporation; HONOLULU PLANTATION COMPANY, a corpora-tion; CHOW AH FO, JOHN II ESTATE, LIMITED, a corporation; WILLIAM G. IRWIN, OAHU SUGAR COMPANY. LIMITED, a corporation; BISHOP & COMPANY, a copartnership.

DECIDED: JANUARY 25, 1902.

1. In an action to condemn the leasehold interest of the defendant in 561.2 acres of certain lands desired by the United States for the purposes of a Naval Station, where the jury returned a verdict al-lowing as damages the sum of \$105,000 as the value of the leasehold interest and improvements of defendant placed on said lands, upon a motion for a new trial made by plaintiff on the ground of an excessive valuation of said leasehold interest, *Held*, that the verdict was excessive and not in conformity with the weight of the evidence, the motion allowed and a new trial granted, unless the defendant elects to remit from the verdict the sum of \$30,000 and accept the sum of \$75,000 in full compensation for all damages.
2. Neither the Court nor the jury is bound by the opinions of expert witnesses unless they are in harmony with the weight of the testi-mony, but may consider them in connection with all the other facts in evidence.

EMINENT DOMAIN. MOTION FOR NEW TRIAL.

J. J. Dunne, Assistant U. S. District Attorney, for plaintiff.
Hatch & Silliman, for defendant.

Honolulu Plantation Company Case.

ESTEE, J. This action was brought by the United States to condemn the leasehold interest of the defendant, The Ho-

nolulu Plantation Company, in 561.2 acres of the lands desired by the United States, for a Naval Station.

A jury rendered a verdict therein on the 13th day of January, 1902, allowing \$89,792 as the value of the leasehold in the 561.2 acres of land and the sum of \$15,208 as the value of the improvements on the said land, making a total of \$105,000 for the whole interest of the defendant in the said lands.

When the verdict was rendered, both counsel for plaintiff and defendant demanded a new trial, the plaintiff following up such a demand by the proper notice of intention to move for a new trial on a day certain. On that day, the matter was submitted on briefs to be filed.

The principal question involved in the motion in the judgment of the court is as to the verdict being excessive in amount, and not borne out by the weight of the evidence.

It is presumed the jury intended to be controlled in fixing the value of the leasehold interest in the lands by a preponderance of the evidence, but in the judgment of the Court they failed to do this.

I will review a few of the estimates placed upon this leasehold interest. Mr. Archer, the Assessor of the Territory, and apparently a disinterested witness, placed a valuation of \$25 per acre on the leasehold interest in this land. Mr. Herbert, to all intents an unwilling witness for the plaintiff, placed a valuation of from \$75 to \$100 per acre on the 342 acres shown by the evidence to have been cleared, and \$25 per acre on the remaining 219 acres making an average of from \$54 to \$71 per acre on the whole 561.2 acres.

The testimony of Mr. Low, the manager of the defendant, and who represented the defendant throughout the trial, is glaringly and curiously inconsistent. He gave five different estimates, four of them widely varying, as to the value of this leasehold. In his sworn answer filed herein, he alleges that the defendant would be damaged by the taking of this land in the sum of \$200,000 less \$55,055 for alleged improvements on

said land, placing the valuation of the leasehold in the lands alone at \$144,945.

On the trial the same witness testified that the whole interest of the defendant in the leasehold in these lands was worth \$400,000.

He further testified that the valuation of the land was \$300 per acre without the incumbrance of the leases but with the leases it would be worth \$262 per acre, or about what the average of the estimates of Archer and Herbert would be in this case.

It further appears that in accordance with the laws of the territory, Mr. Low, acting as the manager of the defendant, made a return to the Assessor for the year 1900, in which he swore to the value of the leasehold interests of the defendant in 4720 acres of land, including the 561.2 in controversy, at \$50,000, making an average value of about \$15 per acre; while for the year 1901, he returned the same leasehold interests covering a trifle more acreage, 4774 acres, and including the same 561.2 acres in controversy, at \$50,000 or an average of \$17 per acre.

The evidence showed that a portion of these leased lands other than the 561.2 acres are now and for two years last past has been cultivated to cane and apparently is quite as valuable as the land in controversy.

It is further in evidence, that these tax returns are required by law to be and were sworn to by Mr. Low representing the defendant, and it is further required by said law that these returns shall represent the actual cash value of the property. It is presumed that the defendant through its Manager, Mr. Low, was swearing to the truth when these returns were made. And if so, how is this testimony on the trial to be reconciled therewith?

The compensation for this leasehold must be just, and it must be admitted that defendant should not have a judgment for more than its property is worth, and the value of the property to be taken must be fixed by the rational and usual means.

This value should have been obtained by the jury from a fair and reasonable analysis of all the evidence given by the witnesses on the trial.

So the Court is largely controlled in deciding this motion by the admitted sworn statements of Mr. Low, as to the value of this leasehold interest in this land at a time when there was no reason to inflate its value. Low must have known more of the value of this leasehold than any other witness called by defendant or by plaintiff, and courts will not permit interested parties to blow hot and cold according to their developed interest in a case at bar.

And again; it is not denied that within three years before the commencement of this case, the Dowsett lease which had then ten years to run was purchased outright by the defendant, including all rents fully paid up, for the sum of \$20,000. This lease then and now covering, inclusive of the 561.2 acres in controversy, some 2900 acres of land, of which the defendant is now in possession under said lease and much of which is being cultivated.

There is no testimony that this land has ever produced any income, and that while 342 acres of the 561.2 has been cleared, it has never been cultivated to cane nor has any crop ever been produced upon it. And while it may be possible to raise cane on this land or part of it with plenty of water, yet it is shallow and much of it is adobe.

The testimony of the eight witnesses called for defendant as experts, as to the value of this leasehold interest, varied in amounts from \$400,000 to \$239,400. In the mind of the Court, these estimates were exaggerations and were greatly in excess of any value shown to be possessed by this leasehold interest by the party chiefly in interest, the defendant, through its Manager, Mr. Low. They were mainly lumping estimates of the value of the property and apparently purely speculative, based upon what this land might possibly produce under given conditions not shown to exist; and from a careful examination of the testimony of at least four of these witnesses (Mr. Ahrens, Mr. Goodale, Mr. Renton and Mr. Meyers, all of whom were

plantation managers), it will be seen that in each instance a value is fixed upon this leasehold interest of 561.2 acres far in excess of the amount of the valuation approximately placed upon the lands of the plantations in which they were each managers and in some of them largely interested. These latter plantations had long been cropped with cane and are all producing incomes now, while no income has ever been produced from this land nor any cane grown thereon.

Neither the jury nor the Court is bound by the opinions of expert witnesses unless they are in harmony with the weight of the testimony; but may consider them in connection with all the other facts in evidence.

In view of all the circumstances, a new trial might possibly be properly had. As has been before stated, upon the rendition of the verdict in the case, a demand for a new trial was made by both counsel for plaintiff and defendant, neither of whom was satisfied with the verdict of the jury.

However, upon a careful consideration of the reasons advanced both for and against the motion made by the plaintiff, and after a lengthy examination of the whole of the record, including the testimony offered on behalf of both parties and of the able briefs filed herein, I am of the opinion that the amount of the verdict rendered by the jury is excessive and not in conformity with the weight of the evidence. This Court would not interpose its judgment in opposition to that of the jury by expressing an amount which in its opinion would be a just compensation for the property of the defendant. But if the jury had returned a verdict in any amount not to exceed seventy-five thousand dollars, this Court would have allowed a judgment to have been entered in accordance therewith.

It is therefore the judgment of the Court that if the defendant remits from the verdict rendered in its favor thirty thousand dollars, leaving the sum of seventy-five thousand dollars as full compensation for its damages of every kind and character in this case, then the motion made by the plaintiff for a new trial will

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be denied. This election must be made by the defendant within three days from the date hereof by the filing with the Clerk of this Court a written consent to the modification of the verdict in that particular, and the entry of a judgment in accordance therewith. Otherwise a new trial will be granted.

MACFARLANE & CO., LIMITED, a corporation, *et alz.* v.
WILLIAM H. WRIGHT, as Treasurer of the Territory
of Hawaii.

DECIDED: FEBRUARY 13, 1902.

1. The Circuit Court will assume jurisdiction in equity originally and consider an application for an injunction where the bill of complainants alleges both the statutory amount of pecuniary injury and the fact that the Act of the Legislature of the Territory of Hawaii complained of is in violation of the Constitution of the United States, and no plea to the jurisdiction being raised on the part of the defendant.
2. Chapter 46 of the Session Laws of 1888, now known as Part V. of Chapter 41 of the Penal Laws of the Hawaiian Islands, 1897, entitled "Sale of Malt Liquors," is unconstitutional and void, and in violation of Subdivisions 1 and 3 of Section 8 of Article 1, and Subdivision 1, Section 2 of Article IV of the Constitution of the United States.
3. Nothing is better settled than that the Legislature of a State or a Territory cannot constitutionally enact laws discriminating in favor of its own citizens and against the citizens of another State or Territory of the United States; and where a territorial statute provides for the issuance of a license for the brewing of malted liquors in the District of Honolulu, Island of Oahu, and a license was issued and malted liquors brewed thereunder; and where said statute provided for the issuance of licenses to individuals to sell "by the glass, or in any other quantity less than five gallons," beers manufactured in Honolulu, upon the payment of an annual tax of \$250, but with the proviso that such individual will not sell or dispose of on the premises for which he is licensed "any..... malt liquors or spirits of any description whatever.....and also that he will not store, or allow to be stored, on the premises for which he is licensed, any.....malt liquors.....save such beers manufactured in Honolulu;" and where a number of licenses were issued to different individuals under said Act; and where it further appeared that under the provisions of Sections

434, 5 and 6 of the Penal Laws of Hawaii, 1897, one of the complainants is obliged to pay an annual license tax of \$1,000 for the privilege of selling and disposing of "any spirituous liquors by the glass or bottle" on his premises, under which one of the complainants is selling foreign malted liquors and beers; and where it appeared that while all of the complainants did not establish a clear pecuniary loss, but that two of said complainants showed such a falling off of sales since the issuance of the licenses to sell the home brewed beer as to meet the requirements of the statute in relation to the amount of damage required to give a Circuit Court jurisdiction in this class of cases; upon an application for an injunction to restrain the Treasurer of the Territory from issuing any further licenses under said Act relative to home-manufactured beer,

Held, (1) that the injury sustained by complainants is a continuing one that cannot be estimated at the time of the hearing in dollars and cents; (2) that the injunction should issue on the ground that the Act providing for the levying of an annual tax of \$250 for the privilege of selling home-manufactured beer, to the exclusion of all other spirituous or malted liquors, under said license, is a discrimination in favor of the citizens of the Territory of Hawaii, and against the manufacturers of foreign-brewed beers, in violation of the provisions of Subdivisions 1 and 3 of Section 8 of Article 1, and Subdivision 1 of Section 2 of Article IV of the Constitution of the United States, and is therefore unconstitutional and void.

IN EQUITY. { Application for injunction to restrain issuance of certain liquor licenses.

Robertson & Wilder and *J. J. Dunne*, for plaintiffs.
Hatch & Silliman, for defendant.

This is an application for an injunction prayed for by the plaintiffs against William H. Wright, Treasurer of the Territory of Hawaii, to restrain him from the further issuance of certain beer licenses, so called which it is claimed were issued under the provisions of Chapter 46 of the Session Laws of 1888, said Chapter 46 being part V. of Chapter 41 of the "Penal Laws of the Hawaiian Islands 1897" entitled "Sale of Malt Liquors", also that this Court declare said Statute unconstitutional and void.

The facts appear to be these:

The plaintiffs, Macfarlane & Co., Limited, Peacock & Co., Limited, Ed. Hoffschlaeger & Co., Limited, and St. C. Sayers, are all engaged in the sale of liquors under what are known as "Dealers' Licenses". These licenses are issued under the provisions of Sections 11, 12, 13 of Chapter 44 of the Session Laws of 1882, now known as Sections 431, 432 and 433 of the "Penal Laws of the Hawaiian Islands, 1897." For the issuance to them of said "Dealers' Licenses", each of the plaintiffs last named pays a yearly tax or fee of \$500, and under said license each of them is entitled to sell "ardent spirits in quantities not less than one gallon, wines, ales and other liquors containing alcohol in bottles and in quantities of not less than one dozen bottles; provided that the same and no part thereof shall be drank or used on the premises where they are sold or in any other house or premises contiguous thereto procured or rented for that purpose by the party holding such license.....under the penalty of forfeiting his license and incurring the penalty of the law prescribed on his bond."

The plaintiff, H. Hackfeld & Co., Limited, is a corporation doing business under what is known as a "Wholesaler's License", which license was issued under the provisions of Sections 8, 9 and 10 of Chapter 44 of the Session Laws of 1882, now known as Sections 428, 429 and 430 of the aforesaid Penal Laws, and for which said license said plaintiff pays \$500 annually for the privilege of the "wholesale vending of spirituous liquors in quantities not less than the packages imported and in no other manner; provided that no part thereof shall be drank on the premises where they are sold."

While the remaining plaintiff, Lawrence H. Dee, is doing a retail liquor business under a so-called "Retailers' License" issued under the provisions of Sections 14, 15 and 16 of Chapter 44 of the said Session Laws of 1882, now known as Sections 434, 435 and 436 of the aforesaid Penal Laws, and for which license the said Dee pays a tax of one thousand dollars per annum; thereby securing the privilege of "selling and disposing of any spirituous liquors by the glass or bottle on the premises therein specified between the hours of half past five o'clock in

the morning and half past eleven o'clock at night except Sunday."

Under the license aforesaid, each of the plaintiffs have been and are now importing and selling, in addition to other spirituous liquors, certain beer and malt liquors which are manufactured in various states of the Union; that said plaintiffs are and each of them is an agent in this territory for certain persons and corporations engaged in the manufacture and brewing of said beer and other malt liquors outside of the Territory of Hawaii, and in various states of the United States to wit:

The plaintiff, Macfarlane & Co., Limited, is the agent for the Val Blatz Brewing Co. of Milwaukee in the state of Wisconsin and the John Wieland Brewing Co. of San Francisco in the state of California; the plaintiff, H. Hackfeld & Co., Limited, is the agent for the Anheuser Busch Brewing Co. of St. Louis in the state of Missouri; the plaintiff, W. C. Peacock & Co., Limited, is the agent for the Pabst Brewing Co. of Milwaukee in the state of Wisconsin, American Brewing Co. in the city of St. Louis, state of Missouri and Buffalo Brewing Co. of Sacramento in the state of California; the plaintiff, Ed. Hoffschlaeger & Co., Limited, is the agent for the Fred. Miller Brewing Co. of Milwaukee in the state of Wisconsin; the plaintiff, St. C. Sayers, is the agent for the Seattle Brewing & Malt Co. of the city of Seattle in the State of Washington, while the plaintiff, Lawrence H. Dee, is the agent for the Capital Brewing Co. of Olympia, in the state of Washington.

It further appears, that long after the passage of these Sections of Chapter 44 of the Session Laws of 1882, (now embodied in Sections 428-9, 430, 431, 432, 433, 434, 435 and 436 of the Penal Laws of the Hawaiian Islands, 1897) and under which Sections the licenses were issued to complainants as aforesaid, an Act was passed by the Legislature of the kingdom of Hawaii (Session Laws of 1886) now known as Part IV. of the aforesaid Penal Laws, wherein it is provided by Section 472 thereof, that—

"The Minister of the Interior (now the Treasurer) is hereby

authorized to issue a license for the brewing of malt liquors in the District of Honolulu on the Island of Oahu, for a term of fifteen years.....”

That thereafter an Act was passed by the Legislature of the Kingdom of Hawaii (Session Laws of 1888) now embodied in Part V. (Sections 479 to 483 inclusive of Chapter 41 of the Penal Laws), entitled “An Act to specially license the retailing of malt liquors manufactured under the Act entitled an ‘Act to license the brewing of malt liquors in the District of Honolulu.’” And Section 479 of said Part V. provided as follows:

“The Minister of the Interior (now the Treasurer) is hereby authorized to grant licenses for one year in this Republic to any person or persons making written application for the same, to sell by the glass or in any other quantity less than five gallons, malt liquors manufactured in Honolulu under Section 472 to 483 inclusive, upon receiving for each license, the sum of two hundred and fifty dollars.”

While Section 481 prescribes that—

“Before receiving any license to sell malt liquors as above, the applicant shall file an approved bond with the Minister of the Interior (now the Treasurer) in the penalty of one thousand dollars conditioned:

“.....Second: That he will not sell or otherwise dispose of on the premises for which he is licensed any wines, malt liquors, or spirits of any description whatever; and also that he will not store or allow to be stored on the premises for which he is licensed, any wines, malt liquors or any spirits of any description whatsoever, except such beer manufactured in Honolulu and under the said above mentioned Sections.” (Sections 472 to 478 inclusive), which latter Sections all provide regulations for the person who is to be given a license to brew the malted liquor in Honolulu.

While Section 482 gives to the Minister of the Interior (now the Treasurer) discretionary power to place such provisions in the license or the bond referred to in Section 481 as shall be necessary to the correct regulation of the business and premises licensed.

It was shown upon the hearing that no license was issued to any person to brew malted liquor in Honolulu, in accordance with the provisions of Section 472 hereinbefore referred to, until the 4th day of May, 1899, when such a license was issued to one A. Hocking "to brew malted liquors at Queen street in the District of Honolulu, Island of Oahu, Hawaiian Islands" for the term of two years and nine months from that date. That the Honolulu Brewery and Malting Company, Limited, organized pursuant to said license, began brewing some time in February or March, 1901, and the first output of its beer was on July 1, 1901. Simultaneously with the output of the brewery, to-wit, on said July 1, 1901 the defendant herein began the issuing of licenses under the Act referred to, to various parties, who upon paying the license fee of two hundred and fifty dollars for one year were given the privilege to "sell by the glass or in any other quantity less than five gallons, malt liquors manufactured in Honolulu." Said licenses containing a proviso that said malt liquor should be disposed of only "between the hours of six o'clock in the morning and eleven o'clock at night on every day except Sunday.....(plaintiffs' Exhibit 1).

But as a condition precedent to the issuance of said license, each applicant was required to execute a bond in the penal sum of one thousand dollars conditioned among other things as follows:

".....Second: That he will not sell or otherwise dispose of on the premises for which he is licensed, any wines, malt liquors or spirits of any description whatever, and also that he will not store or allowed to be stored on the premises for which he is licensed, any wines, malt liquors or spirits of any description whatsoever except *such beer manufactured in Honolulu*" and under said above mentioned Act (the Act to license the brewing of malt liquors in Honolulu) Plaintiff's Exhibit 2.

In other words, said licensees are given the privilege of selling at retail, Honolulu manufactured beer under licenses, which are to be paid for at the rate of two hundred and fifty dollars per annum, upon condition that they do not either store or sell

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upon the premises, any foreign manufactured beer or other spirits.

From the testimony of the defendant, W. H. Wright, it appears that twenty-five of these licenses were issued between July 1, 1901, and November 25th, 1901, and the testimony further shows that certain of the licensees are now doing business thereunder.

It further appears from the testimony of Mr. Wright, that before the commencement of these proceedings, the plaintiffs through Mr. Robertson, one of their attorneys, made a demand upon him for a license to sell foreign brewed beers for the same fee required under the law for a license to sell Honolulu brewed beer, to-wit: \$250 per annum, and the said defendant testified that he refused to issue said license.

Thereafter, on November 19, 1901, application was made in writing by the complainants, through their attorneys, upon the said defendant, requesting the issuance to them of licenses to "sell beer by the glass and in any other quantity less than five gallons, under the provisions of Chapter 46 of the Session Laws of 1888 (Sections 479-483, Penal Laws), excepting therefrom that provision which prevents the sale and storing on the premises of malt liquors other than beer manufactured in Honolulu." Thereafter, on the 21st day of November, 1901, the said plaintiffs, through their attorneys, addressed another communication to the defendant, in which they complained of the fact that Chapter 46 of the Session Laws of 1888, was in conflict with the Constitution of the United States and void as discriminating in favor of local beer and against beer made on the mainland in regard to the amount of the license fee, and requested that he cease to issue any further licenses under the conditions imposed by said statute, to-wit: those conditions which prohibit the licensees from selling other beer than Honolulu beer; which said communication was acknowledged by the defendant in a letter dated November 26th, 1901, in which he states that "no more licenses will be issued for the time being."

No licenses, as demanded, were ever issued to the complainants or any one of them, as in the language of the defendant

in his answer on file herein, "in the exercise of the discretion vested in him, he refused to issue the licenses hereinabove requested and still refuses to issue the same."

While the real issue in this case is whether Chapter 46 of the Session Laws of 1888 (now part V., Chapter 41 of "The Penal Laws of the Hawaiian Islands, 1897"), is unconstitutional and void by reason of its discrimination against the beer products of the other states and territories of the United States, yet the jurisdiction of the Court on other grounds has been assailed upon the hearing, although no plea thereto was raised by defendant's answer.

In the matter of jurisdiction two questions are to be considered by the Court:

First: Is there a constitutional question involved in the case? and Second: Do the facts in the case show an amount of injury sufficient to enable the Court to assume and retain jurisdiction in accordance with the provisions of the law giving jurisdiction to Circuit Courts in certain cases?

Section 1 of the Act of 1888 (Vol. 25, Statutes of U. S., P. 434), amendatory of the Act of 1875, provides as follows:

"The Circuit Courts of the United States shall have original cognizance . . . of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2000, and arising under the Constitution or laws of the United States."

There is no doubt as to the bill of complainants showing upon its face a sufficient case for the Court to take jurisdiction originally, alleging as it does both the statutory amount of injury and the fact that the territorial statute complained of is in violation of the Constitution of the United States; and no plea having been filed on the part of the defendant to the jurisdiction. As was said by the Supreme Court of the United States in the case of *Hartog v. Memory*, 116 U. S. 588, parties cannot call upon the Court to go behind the record "except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when no such plea has been filed."

This is not an action at law. It is an application for an injunction and therefore within the equity jurisdiction of the Court. The injury complained of, if any be shown, is a continuing one, and it has been frequently held that in a suit in equity, where an injunction is asked for, the amount in dispute is not the amount in controversy, but rather the value of the object to be gained by the bill.

In the case of *Humes v. City of Ft. Smith*, 93 Fed. 857, 862, where an objection was made to the jurisdiction of the Court because the amount did not exceed the sum of two thousand dollars, the Court held that:

"The jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected or the extent of the injury to be prevented by the injunction."

Delaware L. & W. R. Co. v. Frank et al., 110 Fed. 689; *Interstate Bldg. & Loan Assn. v. Edgefield Hotel Co.*, 109 Fed. 692; *Nashville St. L. Ry. Co. v. McConnell*, 82 Fed. 65.

See also the case of *Haverhill Gaslight Co. v. Barker et al.*, 109 Fed. 694, where it was held that a Federal Court of equity has jurisdiction of a suit by a gas company against officers of a state to enjoin the threatened enforcement of an order made by defendants, under a statute requiring complainants to supply gas to customers at a rate which is alleged to be so unreasonably low that the enforcement of the order will result in depriving complainant of its rights under the Fourteenth Amendment, both on the ground of a prevention of a multiplicity of suits between complainant and its customers and because such suit is the most approved method of determining the constitutional questions involved.

"The dignity and value of the right assailed, and the power and authority of the source from which the assault proceeds are elements to be considered in the computation of damages if they are to be not only compensation for the direct loss inflicted, but a remedy and prevention for the greater wrong and injury involved in the apprehension of its repetition." *Barry v. Edmunds*, 116 U. S. 550.

And while it is true that the complainants did not all establish a clear pecuniary loss, yet it is apparent that each of them was injured in his individual right to free commerce in the infringement thereof, by this discriminating statute, and in addition to this common injury sustained by all, there was in the estimation of the Court, sufficient specific pecuniary loss shown by at least two of the complainants, to-wit: Peacock & Co. and L. H. Dee, in damage to each of them by reason of the falling off of sales since the issuance of the licenses to sell Honolulu brewed beer to meet the requirements of the statute in relation to the amount of damage involved in a suit to give this Court jurisdiction, and especially as it appears that this injury will be a continuing one, the amount of which cannot now be clearly estimated in dollars and cents.

It would seem apparent, therefore, that the jurisdiction is shown by at least two of the complainants.

"The general principle * * is that if several persons be joined in a suit in equity or admiralty, and have a common and individual interest, though separable as between themselves, the amount of their joint claims or liability will be the test of jurisdiction, but where their interests are distinct and they are joined for the sake of convenience only and because they form a class of parties whose rights or liabilities arose out of the same transactions or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this Court jurisdiction by appeal, but each must stand or fall by itself alone." *Clay v. Field*, 138 U. S. 464; the same Court saying in the case of *Schived v. Smith*, 106 U. S., P. 188:

"The theory is that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action."

Holt et al. v. Bergerin et al., 60 Fed. 1; *Putney v. Whitmire et al.*, 66 Fed. 385; *Nashville C. and St. L. Ry. Co. v. McConnell* 82 Fed. 65, 72-5.

To this question of jurisdiction there is another aspect besides that of the pecuniary nature already discussed, and that

is in relation to the infringement of the constitutional right of the plaintiffs "to all privileges and immunities" enjoyed by citizens of the territory, in the sale of foreign products within the territory, and their right to be free from all discriminating legislation.

Subdivision 1 of Section 8 of Article One of the Constitution of the United States prescribes that:

"All duties, imposts and excises shall be uniform throughout the United States;" Subdivision 3 of said Section 8 also providing, that Congress shall have power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

While the so-called "Equal Rights Clause," Subdivision 1 of Section 2 of Article IV., of the Constitution provides that:

"The citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states."

Under the state of facts disclosed in this case, are the complainants, while selling the beers of the different persons and corporations, citizens of other states, for whom they respectively act as agents in Honolulu, on an equal footing in a free market with the manufacturers of home brewed beer?

Sections 479 to 483 of Part V., Chapter 41 of the Penal laws, and under which laws some twenty-five licenses were issued by the Treasurer of the Territory, as appears in evidence, together authorize the Treasurer to issue licenses for one year for a fee or tax of two hundred and fifty dollars to any person who desires to sell "malt liquors manufactured in Honolulu," by the glass or in any other quantity less than five gallons, upon the execution of a bond that he will not "sell or otherwise dispose of on the premises for which he is licensed any wines, malt liquors or spirits of any description whatever; and also that he will not store or allow to be stored on the premises for which he is licensed, any wines, malt liquors or any spirits of any description whatsoever *except such beer manufactured in Honolulu.....*"

The "wholesale vending of spirituous liquors," under Section 429 of the Penal Laws, in which one of the plaintiffs is en-

gaged, and for which an annual license fee of \$500 is required, simply entitles the licensee to sell liquors in the original packages imported, and in no other manner. Four of the plaintiffs, who have been licensed under Section 432 of the Penal Laws, having what are known as "Dealers' Licenses," and for which they pay five hundred dollars a year, are privileged to sell "ardent spirits in quantities not less than one gallon, wines, ales and other liquors containing alcohol, in quantities not less than one dozen bottles." But with the proviso that such liquors shall not be drunk or used on the premises where they are sold.

While Lawrence H. Dee, the remaining plaintiff, has what is known as a "Retailer's License" under Sections 434, 435 and 436 of the Penal Laws, for which he pays an annual fee of one thousand dollars, and which entitles him to sell and dispose of any spirituous liquors "by the glass or bottle on the premises therein specified between the hours of half past five o'clock in the morning and half past eleven o'clock at night, except Sundays."

It seems to be clear, that upon the face of Sections 479 to 481 inclusive, they are grossly discriminating against a foreign manufactured commodity, in this instance foreign manufactured beer. And this is made absolutely plain from the testimony of Mr. Wright, the defendant herein, who, referring to a conversation with Mr. Robertson, one of the attorneys for the complainants in relation to the issuance of a license to them, said:

"You informed me what you wanted and I told you that I would not issue a license under that law (Act of 1888) to sell foreign beer, and you then told me that perhaps there would be a suit brought against me....I refused to issue a license under that law for the sale of beer manufactured outside of Honolulu."

"The Court: Let us get at it. For a manufacturer of the mainland beer to sell beer in this territory, he must pay to the territory a thousand dollars a year; is that so?

- A. They must obtain a retail liquor license.
 - Q. For a thousand dollars a year?
- Yes, sir; which permits them to sell also, permits them to sell everything.

Q. But they cannot sell that imported beer unless they have one of these thousand dollar licenses?

A. That is correct.

Q. And they can sell home-made beer for \$250 a license, is that correct?

A. Yes, sir."

In other words, any man to whom a license is issued to sell and who will give bond to sell none but Honolulu brewed beer, can do so for a license fee of \$250 a year; but any man who desires to sell imported beers at retail, must take out a retailer's license and pay \$1000 a year, or exactly four times the amount he would have to pay to sell home-brewed beer alone, and while paying this \$1000 a year, he is not even then permitted to sell the Honolulu commodity thereunder.

Clear discrimination is shown as against the manufacturers of the foreign commodity, for which they have a right, through their agents, to complain, and the fact that the \$1000 license also covers the sale of spirituous liquors other than beer, is a mere incident; the fact remains that the imported beers cannot be sold except upon a license costing four times the amount of the license to sell the home-brewed beer. Such a discrimination is repugnant to the Constitution of the United States and clearly in violation of its provisions hereinbefore set forth.

It is true that, under the police powers of a state or territory, it can regulate the sale of all intoxicating liquors within its bounds, or prohibit such sale entirely, but in doing so it cannot discriminate against the stranger within its gates. The local laws of this territory, far from prohibiting the sale of spirituous liquors herein, directly contemplate the continuance of the liquor traffic, and derive a revenue therefrom by licensing it. Nothing is better settled, however, than that a state or a territory cannot constitutionally enact laws discriminating in favor of its own citizens and against the citizens of any other state or territory of the United States. On this rests one of the most sacred rights of citizenship. If the laws of one state or territory can discriminate against the property rights of the citizens of another state

or territory in one thing, they can do so in all things. It would hardly seem necessary to refer to authorities sustaining this proposition. But it was held by the Supreme Court of the United States in the case of *Walling v. Michigan*, 116 U. S. 446, which is a case in relation to the constitutionality of a statute imposing a tax on persons engaged in the sale of liquors to be brought into and sold within the state:

"A discriminating tax imposed by a state operating to the disadvantage of the products of other states when introduced into the first mentioned state is in effect, a regulation in restraint of commerce among the states and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

So, too, in the case of *Webber v. Virginia*, 103 U. S. 344, referring to the statute of the state of Virginia, which provided for the payment of a license fee for the right to sell sewing machines in other states, the Court says (page 351):

"Commerce among the states in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority by reason of its foreign growth or manufacture."

Leloup v. Port of Mobile, 127 U. S. 640; *Welton v. State of Missouri*, 91 U. S. 275, and also the very recent case of *Lansing v. Davies & Co.*, 13 Haw. 286, which is to the same effect.

I am, therefore, of opinion that Chapter 46 of the Session Laws of 1888, now known as Part V. of Chapter 41 of the "Penal Laws of the Hawaiian Islands of 1897," entitled "Sale of Malt Liquors," is unconstitutional and void. Let the injunction issue as prayed for.

NOTE: Appeal dismissed. See *Wright, Treasurer, etc. v Macfarlane & Co., Limited, et al.*, 122 Fed. 770.

FEBRUARY, 1902.

IN THE MATTER OF THE ESTATE OF OLAF OMSTED,
a Voluntary Bankrupt.

DECIDED: FEBRUARY 25, 1902.

1. Under the provisions of Section 7, Subdivision "e." of the Bankruptcy Act of 1898, which provides that "claims of secured creditors may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities, * * * but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities," the Referee in Bankruptcy has power to decide as to the value of the securities of any such creditor for the purpose of allowing the claim and permitting the creditor to vote at the first meeting of the creditors of the bankrupt.
2. The valuation placed by a Referee on claims held by a secured creditor of the bankrupt, in order to ascertain the amount for which said secured creditor may be allowed to vote at a first meeting of the creditors of a bankrupt, is not final.
3. Under General Order No. 21 of the General Orders in Bankruptcy of the Supreme Court of the United States, claims upon open accounts should contain an allegation to the effect that "no note has been received for such account, nor any judgment rendered thereon," if it is a fact that no note has been received.
4. Where the United States District Court made an order of reference after an adjudication of the debtor as a bankrupt, ordering him to attend before the Referee on the 24th day of December, 1901, at 10 o'clock a. m., at his office in Hilo, and the Referee issued a subpoena before said day to the bankrupt ordering him to attend before him, and thereafter vacated the said subpoena before the day set for the bankrupt to attend before him; *Held*, that the Referee had no jurisdiction to issue the subpoena to the bankrupt before the said 24th day of December, 1901; the issuance of the same was unnecessary under the order of reference of the United States District Court, and the act of the Referee in afterwards vacating the same was proper.

IN BANKRUPTCY. PETITION FOR REVIEW OF PROCEEDINGS OF
REFEREE.

Smith & Parsons, for petitioning creditor.

T. C. Ridgeway, Referee, *in propria persona*.

ESTEE, J. After an examination of the certificate of the Referee in Bankruptcy at Hilo, upon the three points submitted to me for review, I find the following:

1. On the 2nd day of December, 1901, when I made the order of reference, after the adjudication of bankruptcy in the above entitled proceeding, the said Olaf Omsted, bankrupt, was ordered to attend before the Referee on the 24th day of December at 10 o'clock a. m. at his office in Hilo. Any further orders in relation to the attendance of said bankrupt before the Referee at the time indicated were unnecessary, as it was assumed that the bankrupt would obey the order of this Court and attend before the Referee for the proper examination by his creditors on the day named. It is clear that under the language of the order of this Court referring this proceeding (and there being no special rule of this Court in relation thereto) the referee did not obtain jurisdiction over the bankrupt until after the said 24th day of December, 1901; that the issuance of the subpoena to the said bankrupt prior to that date was unnecessary and beyond the jurisdiction of the Referee, and his action in vacating the same was proper, although he should not have issued the subpoena in the first instance, as the vacating of the same doubtless misled the bankrupt into the belief that there was no necessity for him to obey the first order of this Court.

2. Upon the second proposition presented, namely, as to the allowance of the creditor, John W. Mason, to vote his claim at the first meeting of the creditors for only \$1019.75, instead of for \$3269.75, the amount claimed by said creditor should be voted, the Referee acted within his powers under the provisions of Subdivision e. of Section 57 of the Bankruptcy Law, which provides:

"That claims of secured creditors.....may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities.....but shall be allowed for such sums only as to the Courts seem to be owing over and above the value of their securities....."

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The Referee having acted in the matter and decided as to the value of the securities for the purpose of permitting the creditor to vote at this meeting, and such action not being final as to the value of such securities for any other purpose, this Court will not interfere with such decision, and hereby confirms the action of the Referee.

3. In reference to the allowance of the claims of M. Wachs, Hilo Wine and Liquor Co., J. D. Kennedy, Hawaii Herald Publishing Co., Ltd., and E. N. Holmes, the decision of the Referee was erroneous. While it is true Form 31 of the "Forms in Bankruptcy" was followed in the preparation of said claims, yet as such claims all appear to be upon an open account, the claims in each instance should have contained an allegation to the effect that "no note has been received for such account nor any judgment rendered thereon," in order to make these claims conform to general order of the Supreme Court "General Orders" in Bankruptcy, if it is a fact that no note was received in each instance; and if a note was received, the allegation should be so modified as to state the facts and in accordance with Section 57 (b) of the Bankruptcy Law, the note should be filed with the proof.

The action of the Referee in regard to these claims is therefore disapproved, and a recommendation made that said claims be so amended as to conform to this decision.

UNITED STATES OF AMERICA *v.* ESTATE OF BERNICE PAUAHI BISHOP, DECEASED: and JOSEPH O. CARTER, *et al.*, Trustees under the will of BERNICE PAUAHI BISHOP, deceased; OAHU RAILWAY AND LAND COMPANY, LIMITED, a corporation, THE DOWSETT COMPANY, LIMITED, a corporation; THE HONOLULU SUGAR COMPANY, a corporation; HONOLULU PLANTATION COMPANY, a corporation; CHOW AH FO, JOHN LI ESTATE, LIMITED, a corporation; WILLIAM G. IRWIN, OAHU SUGAR COMPANY, LIMITED, a corporation; BISHOP & COMPANY, a co-partnership.

DATED: MARCH 11, 1902.

1. The actual market value of the leasehold interest of the defendant in the lands sought to be condemned, at the date of the issuance of the summons, is the measure of compensation to be awarded in this case.
2. The actual market value of the said leasehold interest must be shown by the usual and common means adopted for such purposes.
3. Speculative values must not be considered.
4. The value of a leasehold interest is its actual market value over and above the amount of rent of the land leased and the taxes, if the lessee has to pay the taxes.
5. In placing a value upon the leasehold interest in the lands sought to be condemned, a mere speculative or possible value of sugar that might be produced in the future on said land covered by the said leasehold interest cannot be considered by the jury.
6. Arbitrary or lumping methods of assessing damages for the taking of property are to be condemned.
7. Knowledge obtained by the jury through personal inspection of the land upon which this leasehold interest exists, may be used only in determining the weight of conflicting testimony respecting the value of the said leasehold interest in the land, but not otherwise.
8. What weight to be given to expert testimony.
9. Sworn tax returns as to the value of the leasehold interest of the defendant in said lands made to the Assessor of the Territory by the manager of the defendant in accordance with law, are admissions against interest, and are competent evidence tending to show what the defendant then believed to be the value of said leasehold interest.
10. A statement of the assets and liabilities of the defendant filed by the secretary of the defendant with the Treasurer of the Territory, as required by Section 2076 of the Civil Laws of the Territory, is admissible in evidence as a statement against interest.
11. The value of the user to the defendant for the remaining portion of the term of its leasehold interest in the lands sought to be condemned, of any improvements placed on said lands, may be ascertained by the jury, but must be assessed separate and distinct from the value of the leasehold interest in said lands.
12. The value or cost of construction of the sugar mill, the pumping stations or any of the machinery belonging to the defendant, cannot be considered unless the same were constructed or standing upon the land sought to be condemned at the time of the commencement of the action.
13. Under the provisions of Section 11 of the Treaty of 1887 between the Government of Hawaii, then represented by King Kalakaua,

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and the Republic of the United States, the United States Government acquired the exclusive right to the land-locked waters of Pearl Harbor, and such government now owns and of right controls all of the waters thereof.

EMINENT DOMAIN.

Action brought to condemn certain lands under the provisions of an Act of Congress dated August 1, 1888, entitled "An Act to authorize the condemnation of land for sites of public buildings and for other purposes."

J. J. Dunne, Assistant U. S. District Attorney, for the Government.

Hatch & Silliman, for Honolulu Plantation Company.

Honolulu Plantation Case. Second trial.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the jury, you have patiently listened to the evidence in this case for over a week; you have visited the lands in controversy; you have for two days listened to the exhaustive arguments of the learned counsel in the case. And now it only rests for the Court to charge you, and submit the case for your consideration and verdict.

This general action in which the Honolulu Plantation Company is one of the defendants, is brought under the provisions of an Act of Congress of the United States, dated August 1, 1888, entitled "An Act to authorize the condemnation of land for sites of public buildings and for other puropses." (Vol. 25, U. S. Statutes, P. 357.)

The lands sought to be condemned, together with all interests of every kind therein, are certain lands situate in the District of Ewa, in and about the Harbor of Pearl Lochs, sometimes called Pearl Harbor, in the Island of Oahu, in the Territory of Hawaii.

The United States of America seeks to condemn these lands and to acquire a fee simple estate therein for a public use, to-wit: for the purpose of erecting and maintaining thereon a naval station and channel defense, for the uses and purposes of the United States of America, and of the Navy Department thereof, and for the improvement of the harbor and channel leading thereto, known as Pearl Lochs, sometimes called Pearl Harbor, together with the erection and maintenance upon said tracts and parcels of land, of all such public buildings, magazines, arsenals, navy-yards, light houses, quarantine stations, wharves, docks, piers, canals, roads, ditches, flumes, aqueducts, pipe lines, cemeteries and sewers as may be proper or necessary to or for the efficient maintenance of said naval station and harbor and channel defense for the uses and purposes of the United States government therein and of its said Navy Department.

The property especially sought to be condemned by the United States government in this present case now being tried before you, is the leasehold interest owned by the defendant, the Honolulu Plantation Company. The lines as shown upon two certain maps introduced in evidence and marked "Plaintiff's Exhibit 8," and "Defendant's Exhibit A," are the exterior boundary lines of the tract which show the boundary of the leasehold. The said maps showing the leasehold of the property of the 561.2 acres of the Honolulu Plantation Company, with which maps you are familiar from the frequent reference thereto throughout the trial.

The leasehold interest of the defendant herein is derived from two sources, which was made apparent on the trial by the introduction of the leases themselves, but a brief statement of which will doubtless be of some service to you in understanding the exact nature of this interest. It appears that on the first day of September, 1888, Charles R. Bishop and others, as trustees under the will of Bernice Pauahi Bishop, deceased, the then owner of the fees in these lands, made a lease to one James I. Dowsett, covering the lands in question, and also certain other lands, including in all about 2900 acres; said leasehold interest was to continue for a period of twenty years from the said first

day of September, 1888, or until September 1, 1908. The rental reserved being \$900 per annum.

Subsequently, J. I. Dowsett died, and the administrator of the estate, on the first day of August, 1898, sub-let the land involved in the present suit and the other lands described, in all about 2900 acres, to the Honolulu Sugar Company for the round sum of twenty thousand dollars. In other words, the Honolulu Sugar Company bought the leasehold interest of the Dowsett estate in all these lands, fully paid up, for \$20,000. This leasehold interest then had some ten years to run and was a fully paid up lease, when within two months thereafter, to-wit: on the 28th day of September, 1898, the Honolulu Sugar Company assigned said lease to the defendant herein, the Honolulu Plantation Company, who took possession under the lease and is in possession now under the same. This lease is the so-called Dowsett lease. The second lease upon which the defendant bases its interest in these lands is a lease made by the trustees of the estate of Bernice Pauahi Bishop, deceased, dated October 1, A. D. 1898, covering the lands embraced in the lease from the Dowsett estate and hereinbefore referred to, and involved in this present suit, and certain other lands, including in all over 2200 acres, and covering especially the 561.2 acres of land sought to be condemned by this proceeding.

Subsequently the Honolulu Sugar Company, and at about the same date, assigned this lease to the defendant herein, the Honolulu Plantation Company, a corporation, duly incorporated in the state of California. Under the terms of this lease from the Bishop estate, so-called, the lessees were to be given possession of the demised premises for a period of thirty-two years from the first day of September, 1908, the date of the cessation of their possession under the Dowsett lease, and for thirty-four years from the first day of January, 1906, for the whole of said lands.

The rental agreed to be paid by the Honolulu Sugar Company and its assignee, the defendant, the Honolulu Plantation Company, as a consideration for said lease of said lands, is three and a half per cent. of the gross annual amount of sugar

produced on the premises, it being understood that the said percentage shall not be less than \$1333.33 per year from January 1, 1906, to September 1, 1908; and not less than four thousand dollars net in any one year thereafter from and after the said September 1, 1908. It is clear, therefore, from an examination of these leases, that they cover a large tract of land, namely, one of them over 2900 acres of which the portion desired by the government is but a small part, a trifle over a fifth thereof, to-wit: 561.2 acres, as was agreed upon between the counsel at the trial. The total area sought to be condemned and included within the lines marked out on the maps hereinbefore referred to being 561.2 acres. The other lease covers over 2100 acres.

It is the value of these leasehold interests in these 561.2 acres of land that you are to estimate. No testimony has been introduced by either party showing or tending to show the value of the leasehold or any part of the land described in the leases, except as to the 561.2 acres sought to be condemned by the government, save and excepting certain written admissions appearing in the assessment returns, and the returns made to the State Treasurer's office, introduced by the plaintiff in evidence.

I charge you that private property cannot be taken for public use without "just compensation." This is the language of our fundamental law, the Federal Constitution (Article 5 of the Amendments of the Constitution of the United States.)

In this behalf I charge you, also, that the leasehold interest of the defendant, the Honolulu Plantation Company, is property, and that the said defendant is entitled to receive a "just compensation" for its taking. And in assessing this "just compensation," it is your duty to see that it is "just compensation," not merely to the individual whose property is taken, but to the public who is to pay for it. *Searl v. School District*, 133 U. S. 553, 562.

I further charge you that it is your duty to treat both sides with equal fairness and impartiality in arriving at a conclusion on the question of compensation. You are not to give any one side any preferment or advantage denied the other. For instance, you are not to place an unduly depreciative valuation

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upon this leasehold interest because the United States government wants it, nor should you place an exaggerated valuation upon the property either because it is private property or because the government wants it.

And the Court reminds you that you are to be the sole judges of the weight and truthfulness of all of the evidence introduced herein.

If in the course of this trial this Court has by any word or expression appeared to favor one side or the other, it was not so intended. It is the duty of the Court and its aim, and it should be the duty of the jury, to do absolute justice between the parties in this, as in all other actions; and you are simply to take the law from the Court and confine yourselves solely to a consideration of the testimony produced in the case in arriving at a verdict, without limiting your consideration to any isolated portions of the testimony, but considering it as a whole, fairly weighing all the testimony, both the direct and indirect, with all reasonable inferences to be drawn therefrom.

I further instruct you that the burden of proof in this case is upon the plaintiff; in other words, the claim of plaintiff as to the amount of compensation so to be awarded to the defendant by your verdict must be proven by the plaintiff by a preponderance of the evidence.

I instruct you that whenever private property is taken for a public use, the fair market value of the property at the time of the taking should be paid for it; and according to the statute of this territory, the actual value of the property at the date of the issuance of the summons is designated as the measure of the valuation of all property to be condemned and I charge you that the date of the summons in this case was July 6th, 1901.

It is to this date therefore that you are to look in fixing the value of the leasehold interest involved in this case. You are to remember that the material consideration is the actual condition of the leasehold interest on that date. It is to this that you are limited.

In placing a valuation upon this leasehold interest, you cannot consider the mere speculative or possible value of sugar

that might be produced in the future on this land. This is too remote and uncertain and can form no just basis for a just valuation. The amount of sugar which it is claimed can be produced on this land is purely speculative, as the amount of such sugar crop would depend on many conditions, such as the character and amount of fertilizer used, the amount of water, the manner of cultivation, the depth and richness of the soil, and many other elements which necessarily must enter into the problem of a crop which might be produced in any one year or series of years. But you may consider what the land is best suited for and the defendant is entitled to a just compensation for its leasehold interest in these lands for any purpose for which it may reasonably be used; and if from the evidence you should find that the defendant has any improvements upon that portion of the land covered by the leasehold interest of the defendant and which is sought to be condemned by the United States, which were there prior to the 6th. day of July, 1901, you are to find the value of the user of such improvements to the defendant for the remaining portion of the term of the leases, separate and distinct from the value of the leasehold interest itself in said lands. And in this connection, I instruct you that under the terms of the Bishop lease so-called, all improvements on said land at the termination of said leasehold interest go to the lessors or its successors in interest.

I further instruct you that you are not to consider in this case, the cost of construction or the value of the sugar mill, the pumping stations or any of the machinery belonging to the defendant, if said sugar mill, pumping stations or machinery were not constructed or standing upon the 561.2 acres of land sought to be condemned by the government at the time of the commencement of this action, to-wit: July 6th, 1901.

Most of the evidence introduced by the defendant in this case as to the value of these leaseholds was expert testimony namely the opinions of witnesses given in answer to hypothetical questions propounded to them; and while great weight should always be given to the opinions honestly expressed and fairly given of those persons familiar with the subject, yet you are

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not bound by such expert opinions, but they are to be intelligently examined by you in the light of your own personal knowledge and experience, giving force and control only to the extent that they are found to be reasonable, and in view of all the other testimony presented in the case. And while the jury cannot in any case, act under particular facts material to its disposition, which rest solely within their private knowledge, but should be governed by all the evidence adduced, yet they should judge of the weight and force of that evidence by their own general knowledge of the subject. In a word, the jury is not bound to give weight to testimony which is contrary to what every person of good sense and ordinary intelligence knows to be true.

Gentlemen of the jury, during the trial, you visited the lands sought to be condemned, the object of such visit was that you might familiarize yourselves with the nature and extent of the land and its physical characteristics and condition, so as to better enable you to understand the evidence on the trial of the case. The knowledge so acquired may be used by you in determining the weight of conflicting testimony respecting the value of the leasehold interest in these lands but not otherwise; the court instructs you that there is no testimony in the case as to the value of the artesian well on said premises. You will therefore not give the matter of this well any consideration.

You are further instructed that unquestioned written admissions are among the strongest testimony which can be introduced tending to show any given state of facts and the Court reminds you that some evidence has been introduced by the government tending to show certain valuations of this leasehold interest sworn to by the defendant through its manager, Mr. Low, before the commencement of these proceedings, to-wit: certain tax returns filed with the Assessor pursuant to the laws of the Territory of Hawaii. Such sworn returns made by the representative of the defendant to the assessor are admissions against interest and are competent evidence tending to show what the defendant then believed the value of the property to be. You may, therefore, consider such returns along with the other

evidence in the case upon the question of value of this property and give it such weight as you may deem just.

So also as to certain other written evidence introduced by the government tending to show the value of the real property of the defendant, and which includes the leasehold interest of the defendant in this land sought to be condemned. It is provided by Section 2076 of the Civil Laws of the Territory of Hawaii that—

"Every corporation or incorporated company formed or organized under the laws of any foreign state which may be desirous of carrying on business in this Republic, and to take hold and convey real estate therein, shall file in the office of the Minister of the Interior * * *

4. An annual statement of the assets and liabilities of the corporation or company, in this Republic, on the first day of July of each year."

The defendant being a foreign corporation, through its Secretary, Mr. Sheldon, about six months prior to the commencement of this suit, filed with the Treasurer of the Territory, on or about the first day of January, 1901, that statement as required by the territorial law. This statement is also admitted in evidence as a statement against interest, and you are to give it such weight and significance as to you may seem proper.

The Court further instructs you that you are to reach a final conclusion in this case by a preponderance of the evidence, which is not meant, gentlemen, the evidence given by the greater number of witnesses, but the superior strength of certain evidence and the greater weight which that evidence may in your judgment be entitled to. In weighing the testimony you should take into consideration the opportunities of the witnesses for seeing or knowing the things about which they testify, and especially so when testifying as experts as to the value and also the interest or lack of interest in the result of the action, the probability or the improbability of the truth of their several statements and the reasonableness of their opinions when testifying as experts, and from all the circumstances, you are

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to determine upon which side the weight or preponderance of the evidence rests.

Arbitrary or lumping methods of assessing damage for the taking of property are not proper and are to be condemned.

You are to bear in mind that the object of this trial is to find out what was the fair market value of the leasehold interest of the Honolulu Plantation Company in the 561.2 acres of land sought to be condemned by the United States on July 6th, 1901. This may be shown by the usual and common means adopted for such purpose and no mere speculative valuations are to be considered by you. You have the right, and it is your duty, to consider all the elements of value affecting this land and the leasehold which is sought to be condemned therein by plaintiff; and it is also your duty to consider that this land is not now appropriated to any valuable use; that it is not now producing a crop. You will in assessing the damage, have the right to take into consideration all the elements of a lack of value as you do all the elements of value. The Court further instructs you, that the value of a leasehold is its actual market value over and above the amount of rent of the land leased and the taxes if the lessee has to pay the taxes.

Some testimony was introduced to the effect that there were favorable places along the shore line of this property for the construction of wharves. I instruct you that the United States government owns and of right controls all the waters of Pearl Harbor and the defendant has no legal right to build a wharf from the shore of the land referred to into the waters of said Harbor without the authorization of the government of the United States.

In the year 1875, and in 1887, treaties were negotiated between the government of Hawaii, then represented by King Kalakaua, and the Republic of the United States, by which the latter government granted reciprocity to Hawaiian sugar and other articles produced in Hawaii.

In the treaty stipulations of 1887, of which treaty stipulations this Court takes judicial cognizance, it was prescribed by Article 11 thereof as follows:

"His Majesty, the King of the Hawaiian Islands, grants to the government of the United States, the exclusive right to enter the harbor of Pearl River in the Island of Oahu, and establish and maintain there a coaling and repair station for the use of vessels of the United States, and to that end the United States may improve the entrance of said Harbor and do all other things needful for the purpose aforesaid."

It will be seen that by the terms of said treaty of 1887, that the United States then secured the exclusive right to the land-locked waters of Pearl Harbor, and so while private parties may own the land bordering on these waters, the waters themselves have belonged to the United States since the date of that treaty.

I therefore instruct you, that in reaching a verdict you are not to consider or place any value upon said inland waters as belonging to the private parties now litigating with the United States government, because although the treaty made between the Kingdom of Hawaii and the United States of America in 1887, by which Pearl Harbor was ceded to the United States, did not in any way affect private ownership in the lands fronting on said Harbor, those parties have no interest other than that of every citizen of the United States in the sloughs and waters of Pearl Harbor, for these inland waters are now and since 1887, have been the property of the United States.

In conclusion let me say to you, that the evidence in this case is very conflicting, and without commenting upon the testimony of any one witness, I instruct you that in considering the testimony of all of the witnesses in this case, you may accept such portions thereof as you may believe to be true, or reject such portions thereof as you may believe to be false,—If the statements of any one or more witnesses are so unreasonable or improbable as that upon their face they do not carry conviction of their truth to your minds, you are at liberty to reject all or any part thereof.

Gentlemen of the jury, under the pleadings in this case, there is but one issue involved—the amount of the just compensation to be awarded to the defendant for the taking of its property.

You must therefore find for the plaintiff a verdict condemning

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the leasehold interest of the defendant, the Honolulu Plantation Company. in and to the 561.2 acres of land desired by the government; and you must find a verdict in favor of the defendant for the amount of the compensation which from all the testimony you shall deem just.

NOTE: To the same effect, see charge in *United States of America v. Honolulu Plantation Co.*, (First trial) dated Jan. 11, 1902, not reported.

IN THE MATTER OF THE APPLICATION OF LEONG
SAI, alias AH SAI, for a writ of *habeas corpus*.

DECIDED: MARCH 24, 1902.

1. Application for a writ of Habeas Corpus applied for alleging detention by Collector of the Customs of the port of Honolulu with intent to return petitioner to China, heard by the Court, the petitioner claiming that he was a citizen of the United States; and evidence held insufficient to satisfy the Court of the birth of petitioner in the Hawaiian Islands.
2. The means of showing that he does not come within the restricted classes is presumably under the control of petitioner; and where, at the time of his alleged birth in the Islands, there was a law making it a penal offense for any parent not to report the birth of a child for registry, and no proof of compliance with such law is introduced on behalf of petitioner, it is a very significant fact against his contention.

CHINESE EXCLUSION LAW. APPLICATION FOR A WRIT OF
HABEAS CORPUS.

Messrs. Fitch & Thompson, attorneys for petitioner.

Robert W. Breckons, U. S. District Attorney, representing E. R. Stackable, Collector of Customs.

ESTEE, J. This is an application for a writ of *habeas corpus*, filed in this Court on the 19th day of March, 1902, by one Leong Sai, alias Ah Sai.

The petition alleges that the petitioner is a citizen of the United States; that he was born in Manoa Valley, Island of

Oahu, Territory of Hawaii, on the 21st day of October, 1882; that the names of his parents are Leong Chun, his father, (now deceased) and Wong See, his mother, now living in the Empire of China; that petitioner is a resident of Honolulu. That he left the Territory of Hawaii on or about the 22nd day of July, 1901, sailing on the steamer "Nippon Maru" from the port of Honolulu for China, where he remained until the 31st day of December, 1901, when he left China and returned to the Territory of Hawaii, arriving at the port of Honolulu on the steamship "China" on or about the 19th day of January, 1902.

The petition further alleges that he is unlawfully restrained of his liberty by E. R. Stackable, Collector of Customs at Honolulu, by being detained at the U. S. Quarantine Station, and that the said E. R. Stackable threatens to deport the petitioner from this country on the ground that he is not entitled to land under the laws of the United States.

The petition alleged that the said Leong Sai, alias Ah Sai, was and is a citizen of the United States. The writ was issued, made returnable on the 21st day of March, 1902, at the hour of ten o'clock a. m., at which time the said E. R. Stackable produced the body of the petitioner in Court and made a sworn return to the writ served upon him, in which he denies that the petitioner is a citizen of the United States, or that he was born in the Islands, and admits that he has petitioner in custody and alleges that he detains him for the reason that he is a person of Chinese descent, and that he has refused to permit him to be landed in accordance with the provisions of the law in such case made and provided, and that he intends to deport him to China.

The single question for this Court to consider upon the facts in this case, is whether the petitioner was born in the Hawaiian Islands and subject to the jurisdiction thereof, and thus a citizen of the United States. Sec. 1, Art. 17, Const. Hawaii, Civil Laws 1897, P. 6; Section 4 of "An Act to provide a Government for the Territory of Hawaii;" *United States v. Ching Tai Sai and Ching Tai Sun*, decided by this Court Aug. 13, 1901.

The petitioner occupies the affirmative in this class of cases, and he must prove by a preponderance of the evidence that he was born in these Islands. *In re Jew Wong Loy*, 91 Fed. 240; *In re Louie You*, 97 Fed. 580; *Lee Sing Far v. U. S.*, 94 Fed. 834; *U. S. v. Chung Hoy*, 111 Fed. 899, C. C. A.

While the petition alleges that the petitioner was born on the 21st day of October, 1882, in Manoa Valley, near Honolulu, Island of Oahu, in this Territory, the witness testified in his own behalf that he was born in November, 1882; that he went to China when he was two years old with his brother and his parents; that his father is dead and his mother and one brother now live in China; that he remained there until he was twelve years old when he returned to Honolulu; this would be in 1894 or 1895; that he stayed here until 1901 when he again went to China in July of that year, returning to Honolulu on the 19th day of January of this year when the Collector of Customs refused to allow him to enter.

He testified further that he lived in this territory from the time he was twelve years of age (in 1894 or 1895) until 1901, and yet he speaks no English, dresses like a Chinese and has every appearance of a Chinaman.

One Noah Kauhane, an Hawaiian native of the Islands, was called for the petitioner, and testified that he remembers the birth of the petitioner in the Islands; that the petitioner's father was a cook for the witness's father, and being absent from his duties some time in 1882, the witness was sent to find out the reason why; that upon inquiry the cook said to him that a boy baby had been born to him; that he, witness, did not see the child; that afterwards he used to come to Honolulu with his father and he saw this boy and knew it was the same boy; that in 1887, witness came to Honolulu to attend the Kamehameha School, and during that time saw the father and child on the street. When asked by the Court if this China boy was not in China from 1884 to 1894 continuously, he said in reply "he was in Honolulu in 1887, in 1890 and in 1893, the boy that I am giving testimony about."

All of which is in contradiction of the testimony of the petitioner himself who swore that he did not come back to Honolulu from China until he was twelve years old, which would be either in 1894 or 1895, if his allegation as to his birth was true.

The only other witness for petitioner was one Ah Lam, a Chinaman who testified only that he had known petitioner as a waiter for three years prior to his departure for China in 1901.

At the time the petitioner was alleged to have been born in these Islands, the law made it a penal offense for any parent not to report for registration the birth of a child. (Sec. 6, Act of 1878, Compiled Laws of Hawaii, 1884 P. 212). It is presumed that all births of children were registered in accordance with this law. No proof of any compliance with such law was introduced on behalf of the petitioner in this case. This is a somewhat significant fact. As was said in the very recent case of *United States v. Chung Hoy*, affirmed on appeal from this Court, 111 Fed. Rep, 899, the means of showing that he does not come within the restricted classes "is presumably under his own control."

"The testimony of the petitioner as to his birth, founded alone upon statements made to him by his mother, and uncorroborated by any but one witness, who in all other respects absolutely contradicts the petitioner, is entirely unconvincing to this Court, who is therefore compelled to hold that he has not proven his birth in the Islands or that he is a citizen of the United States.

It is ordered that petitioner be remanded to the custody of the Collector of the Customs with directions to deport him to the country from whence he came.

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DAVID HALL and EDWARD WOOD v. THE AMERICAN SCHOONER "F. W. HOWE" and S. B. ATKINSON, Master, etc.

DECIDED: APRIL 15, 1902.

1. In an action in admiralty *in rem*, based on Section 4568 of the R. S. U. S. as amended by the Act of December 21, 1898, where it was shown that a schooner bound on a voyage from New York to the Island of Mauritius, and from thence to Port Townsend in the State of Washington as her port of destination, put into the port of Honolulu with two members of the crew suffering from an illness in the nature of scurvy, or beri-beri, and where it is claimed that such illness was the result of a lack of proper provisions and of the usual anti-scorbutics which the statute requires to be provided for each member of the crew daily; and where it was shown that forty days out from Mauritius the members of the crew were compelled, in order to supply themselves with fresh drinking water, to gather rain water from the deck of the vessel; and it being further shown that it was the intention of the Captain when he left the Island of Mauritius to sail directly to Port Townsend; *Held*, that the fact that immediately after reaching the port of Honolulu, the Captain of the schooner made a large requisition for supplies, including both food, water and anti-scorbutics was strong proof that the ship had been insufficiently provisioned for her voyage, and that there had been a shortage in the rations of the men.
2. The master's order for supplies is sufficient proof of their necessity.
3. The burden of proof is on the ship to show that it was fitted out with all the needed articles of food and medicine, and it is not alone what provisions and medicine are aboard, in cases of this character, but what the seamen are supplied with, and how they are supplied with it, that controls.
4. Under Section 4612 of the R. S. U. S., as amended by the Act of Congress of December 21, 1898, certain daily rations are to be served to the members of the crew; and the mere furnishing of the amount of food required by law to be given to the men, if the same is not edible, is not a compliance with the terms of the statute.
5. Where it was shown that there were no weights or measures on board the schooner, as required by Section 4571 of the R. S. U. S., but that the cook guessed at the amount of the food that the men received, *Held*, that neither the master nor the cook has a right to issue to the men provisions according to a method of his own, unless the men agree to such method, and even then the action

is doubtful. When the statute regulates what the rations shall be, the statute must be followed. Except only in cases of great sea peril, those statutory rations must be supplied, and must be reasonably well cooked.

IN ADMIRALTY.

Action *in rem* to recover additional wages of seamen, under Section 4568 R. S. U. S. as amended by the Act of December 21, 1898, and for damages.

Robert W. Breckons and J. J. Dunne, for libellants.
Kinney, Ballou & McClanahan, for libellees.

ESTEE, J. This is a libel *in rem* brought by two of the crew of the schooner "Frank W. Howe" to recover certain penalties imposed by Section 4568 of the Revised Statutes of the United States as amended in 1898, and recoverable as additional compensation for a failure on the part of the master of the vessel to supply libellants with good and wholesome provisions including water, in accordance with the agreement set forth in the shipping articles and as required by law; said libellants claiming that the provisions supplied them were deficient both in quantity and in quality. They also ask for additional damages in the sum of five thousand dollars each for injuries sustained by them and each of them in that they and each of them became and were and now are afflicted with illness and disease which they allege to be scurvy as a result of not being properly supplied with wholesome food or with proper anti-scorbutics while on the voyage hereinafter referred to. The libellants constitute two members of a crew of four men in the forecastle of this vessel.

It appears that on or about the first day of July, 1901, they shipped at the port of New York on the said schooner "F. W. Howe" which was bound on a voyage from said port of New York to the Island of Mauritius in the Indian Ocean; and from there back to a port in the United States for a final discharge; that the vessel reached the Island of Mauritius after a voyage of 119 days, delivered cargo and made freight, and then proceeded on the voyage to Port Townsend in the State of Washington,

United States of America. That while on this voyage from Mauritius to Port Townsend, the libellants became ill and incapacitated for labor, so much so that the master of the vessel was for that and other reasons compelled to bring his vessel within, and enter her at, the port of Honolulu in the Island of Oahu, Territory of Hawaii, as a port of necessity where said schooner arrived on March 19, 1902, and where the libellants were discharged and placed in a hospital for treatment.

The libel alleges that during the voyage from the port of New York to the Island of Mauritius, the libellants were on a short allowance of good and wholesome food and especially so in that the provisions supplied to them were so imperfectly prepared as to be unfit for food; that neither lime juice nor sugar was served daily nor was vinegar regularly served; that potatoes were only served to them for fourteen days of that voyage and onions only for three weeks; that they did not receive the quantity of bread, coffee, sugar, tea, lime juice, vinegar or vegetables required by law, and that instead of tea or coffee they received an indescribable compound unfit for use which was neither tea nor coffee.

It is further claimed that on the voyage from Mauritius to Honolulu, which occupied about 110 days, the same conditions existed; that the bread and beef were so imperfectly prepared that the men as a rule could not eat it; that the salt had to be washed out of the beef after it was cooked and before it could be eaten at all; and that on the voyage from Mauritius to Honolulu, and about thirty days after leaving Mauritius, the supply of fresh water was cut off and the men were compelled to drink the rain water which was gathered by them from or had accumulated on the deck of the vessel.

It is admitted that the libellants became ill on the voyage from Mauritius to Port Townsend, and that as one of the results of such illness, the master brought the vessel into this port; but it is denied that the illness of libellants arose by reason of any connection between libellants and the said vessel or master or owners thereof or that their illness was caused by any shortness of provisions.

It is admitted by defendant that lime juice was not served to the men on the voyage from Mauritius to Honolulu, although it was served in the cabin; and that the sugar gave out about a week before the vessel arrived at Mauritius from New York. In reference to the shortage of potatoes the defendant alleges that they were served liberally on the voyage from New York to Mauritius as long as they remained good, but that they rotted and were thrown overboard. It is alleged that substitutes for the lime juice, sugar and potatoes were supplied in the form of vinegar, stewed fruits, molasses and sweet potatoes, although these latter gave out within a few weeks after leaving Mauritius and before reaching Honolulu. The answer claims that onions were served on the voyage from New York to Mauritius with the exception of about a week before reaching there, where it is alleged a fresh supply were obtained but that they too ran short two weeks before reaching Honolulu.

The leading questions presented for the consideration of the court in this case are two.

1. Were the proper provisions supplied the seamen on board this vessel in accordance with the statutory scale; and if not, were proper substitutes provided?

2. Was the illness of the libellants the result of improper food or lack of the necessary anti-scorbutics required to be provided by the agreement set forth in the shipping articles?

If it is a fact that the prescribed rations were not provided the men on this voyage or when provided, were bad in quality, the ship is liable for the penalties provided by law whether the men were ill or not.

"It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury or sickness, and for his neglect in any of those particulars the owner is liable." *Olsen v. Oregon Coal & Navigation Co.*, 104 Fed. Rep. 574-576.

And the mere furnishing of the amount of food required by law to be given to the men, if the same is not edible, is not a compliance with the terms of the statute. If it be true that the food provided the men on this voyage was so improperly prepared that the men could not eat it, then it was not a lawful ration.

Congress has provided by an amendment to Section 4612 of the Revised Statutes of the United States, which amendment was passed December 21, 1898, (Vol. 30 U. S. Stats. at Large, P. 762) that a certain scale of provisions shall be adopted and served out to the crews of all American vessels daily during a voyage and in accordance with that law, the shipping articles of the schooner "F. W. Howe" had embodied therein the statutory scale of provisions for each seaman, which is as follows:

"Water, 4 quarts daily; biscuits, $\frac{1}{2}$ pound daily; fresh bread, $1\frac{1}{2}$ pounds daily; potatoes or yams, 1 pound daily; coffee, (green berry) $\frac{3}{4}$ of an ounce daily; tea, $\frac{1}{8}$ of an ounce daily; sugar, 3 ounces daily; lard and butter, 1 ounce each daily; salt beef, $1\frac{1}{4}$ pounds three times a week; salt pork, 1 pound three times a week; flour, $\frac{1}{2}$ pound three times a week; canned meat, 1 pound twice a week; fish, 1 pound once a week; canned tomatoes, $\frac{1}{2}$ pound twice a week; peas, a third of a pound twice a week; rice, a third of a pound twice a week; molasses, $\frac{1}{2}$ pint three times a week; pickles, $\frac{1}{2}$ pint twice a week; vinegar, $\frac{1}{2}$ pint twice a week; dried fruits, 3 ounces three times a week; corn meal, 4 ounces twice a week, onions, 4 ounces three times a week; with mustard, pepper and salt sufficient for seasoning."

Section 4612 of the Revised Statutes as amended further provides certain substitutes for said rations as follows:

"One pound of flour daily for the daily ration of biscuit or fresh bread; two ounces of dessicated vegetables for one pound of potatoes or yams; six ounces of hominy, oat meal or cracked wheat, or two ounces of tapioca for six ounces of rice; six ounces of canned vegetables for $\frac{1}{2}$ pound canned tomatoes; one-eighth ounce of tea for $\frac{3}{4}$ of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; 6 ounces of canned fruit for 3 ounces of dried fruit;

onehalf ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions."

The shipping articles imply:

1. That the ship is seaworthy, and 2, that good and sufficient provisions are supplied. Section 4564 Revised Statutes of the United States. *Olsen v. Oregon Coal and Navigation Co.*, 104 Fed. 574-576; *Dickson v. The Cyrus*, 2 Pet. Adm. 407.

The fact that the vessel is supplied with the proper provisions is one of the elements of sea worthiness, and whatever else a ship may be short of, there can be no excuse (except in case of a great peril at sea, which did not occur in this instance) for shortness of the water supply, and more especially when the vessel is sailing over tropical seas as in this case. The voyage of this vessel was over three-fourths around the world, and yet it is undenied that within forty days after leaving Port Louis, Island of Mauritius, the men were made to gather water from the deck of the vessel to supply themselves with fresh water for drinking purposes. It rained, and so the men in the forecastle had drinking water. But what if it had not rained? Then the crew would have been subject to great peril to health and life. It is the duty of a master to provide for all such contingencies.

"If there was a shortage of water, the ship is as liable as if there was a shortage of food. *The Mary Paulina*, 1 Sprague, 45; *Collins v. Wheeler*, 1 Sprague, 188.

A ship cannot sail out of port with a crew unprovided with good, wholesome water or without reasonable food supplies, without violating the law. The Captain is given great powers over his ship and over his men, but he has no right to imperil their health or endanger the ship by failure to furnish proper food or water. The crew of this vessel consisted of one Filipino, who could not speak English, one Italian who also could not speak English, and two simple minded negroes, the libellants, whom it is admitted always did their duty.

As to the shortage of food in the case, it appears to have consisted mainly in a shortage of the vegetable foods, which

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were among the most necessary articles of food required on this voyage, in the preparation of this and the other food and the scarcity and impurity of the drinking water. These were the chief causes of complaint.

It is claimed by the defendant that the two libellants were not ill by reason of any shortage of food or lack of variety, but that they were suffering from beri-beri, a disease which arises from different causes than does scurvy. It is admitted that scurvy is caused by a want of a suitable vegetable diet, while beri-beri often arises from bad sanitary conditions and feeding on rice without sufficient fatty or nitrogenous food substances.

Dr. Sinclair, called by the defense, testified that in his judgment, the men had beri-beri. Dr. Humphris, another equally well known physician called for libellants, testified just as positively that he believed both men had scurvy, although Wood did not show it as much as did Hall; that many of the well known tests had been applied in the case of Hall, such as the application of electricity; that extreme poverty of the blood was shown by an examination in the case of both men. It was agreed by both physicians, that the two diseases were dangerous; that these men might die at any moment; and that impure air and an improper diet contributed to both diseases.

In relation to the claim that Hall was suffering from a secret disease, Dr. Humphris testified that he had made a careful examination of the man and that he found no symptoms of any such disease, Hall himself testifying that he had never had a secret disease in his life and that he was a strong man when he came aboard the "Howe." No such charge was made against Wood.

It appears from the evidence that both of these men did their work faithfully until too ill to do so just before reaching Honolulu. It is a curious circumstance that it was not until the trial of this case that the captain and the cook discovered that Hall was sick when he came aboard. That fact was not entered in the captain's log book, where, if true, it should have been entered as required by law, nor was that fact otherwise made known by the captain.

This man worked regularly on the ship for about five months as an able seaman and he did not develop this or any other illness until within six weeks of reaching Honolulu.

There were eight men aboard of this vessel, the captain, the first and second officers, the cook and the four men in the forecastle. The forecastle was a small place not exceeding five feet by ten in size, and these four sailors were compelled to eat and sleep in this place. It is admitted that the forecastle leaked badly and was constantly wet from the rain. One sick man left the vessel at Mauritius and went into a hospital. No entry is made in the log book of the nature of the illness of this man, as was required by Section 4290 (Subdv. 5) Revised Statutes of the United States, to-wit:

"Every case of illness or injury happening to any member of the crew, with the nature thereof, and the medical treatment," (shall be entered on the captain's log book.)

Two of the men in the forecastle, Peter, the Italian, and the Filipino, were both young men, one being twenty-nine and the other twenty, while the libellants were aged respectively, forty and forty-five; but the Filipino testified that before reaching Honolulu his limbs began to swell. This testimony is not questioned.

The ship was evidently not provisioned in any respect for so long a voyage; no sufficient anti-scorbutics were taken aboard or given in legal quantities on the voyage from New York to the Island of Mauritius, nor was any vinegar given to the men (except to be used as a liniment) on the voyage from Mauritius to Honolulu, while from New York to Mauritius a very little vinegar was furnished to the men.

It is provided by Section 4571 of the Revised Statutes, that:

"Every master shall keep on board proper weights and measures for the purpose of determining the quantities of the several provisions and articles served out, and shall allow the same to be used at the time of serving out such provisions and articles in the presence of a witness, whenever any dispute arises about such quantities....."

It appears from the testimony of the cook that there was an

utter failure to comply with the law in this respect as there were no weights or measures on board the schooner. The food was not weighed, but the matter was left to the cook who guessed at the amount of food and anti-seerbuties the men received, although it appears that the men made many complaints to the first officer about the food. The latter stated that they complained once or twice to him. But it nowhere appears that either the captain or the first officer ever went into the forecastle to inspect the food or examine the sick men. The whole matter appears to have been left to the cook, who gave the men what he pleased and cooked it as he pleased. The captain of a ship is bound to look after the welfare of his men. He is not only master of the ship, but its physician, and he must look after the health of the men as well as their discipline.

Neither the master nor the cook has a right to issue to the men provisions according to a method of his own, unless the men agree to such method, and even then the action is doubtful. When the statute regulates what the rations shall be, the statute must be followed. Except only in cases of great sea peril, those rations, or their equivalent, must be supplied and must be reasonably well cooked.

The Courts have many times held that seamen are the wards of the admiralty, *The Rajah*, 1 Sprague, Fed. Cases 11538; but whether the wards of the admiralty or not, they are entitled to what the law secures to them. The ship's articles are signed as much for their protection as for the protection of the ship.

The burden of proof is on the ship to show that the vessel was fitted out with all the needed articles of food and medicine. *Harden v. Jordan*, 2 Mason 541; *Fed. Cases* 6047. And it is not alone what provisions or medicines are aboard in cases of this character, but what the seamen are supplied with and how they are supplied with it, that controls. It was held in the case of *The Rence*, 46 Fed. R. 805, that:

"Where lime juice is not served and the crew are attacked with scurvy, the ship is liable for the damage the seamen sustain in the absence of proof that they had contracted scurvy before the voyage began."

"The fact that there was a supply of limes on board a vessel, from which the crew are at liberty to help themselves, is not a compliance with the requirements of the Revised Statutes, Section 4569, which makes it imperative upon the master to serve the crew with a regular allowance daily of anti-scorbutics."

Petersen v. J. F. Cunningham & Co., 77 Fed. Page 221.

There may have been food enough aboard the vessel of some kinds, but there was not either food or water as required by law, nor was the food seasonably prepared for the men. Strong proof that the ship was insufficiently provisioned for her voyage and that there had been a shortage in the rations of the men, is found in the fact that the moment the ship got into port in Honolulu, the captain made the following requisition for all these articles as appears from libellant's Exhibit D., to-wit:

"I kit salmon tips; one box pilot bread; twenty pounds white sugar; two boxes pearl barley; one pound Royal B. powder; twenty-five pounds of coffee; twenty pounds dried peas; one gallon molasses; one-half barrel salt beef; four sacks flour; two hams; six sacks potatoes; crate of onions; two cases roast beef; twelve tins soups; two tins corn; twelve tins peas; twelve tins fruit; six tins milk; twelve tins salmon; one case lime juice; ten pounds cabin butter; ten pounds crew butter; sixty pounds cod fish; one thousand gallons water."

It has been frequently held that the master's order for supplies is sufficient proof of their necessity. *The Grapeshot*, 9 Wall, 129, 141; *The Fortitude*, 3 Sumn. 253; *The Lulu*, 10 Wall, 808.

It is in evidence that when the vessel left Port Louis, Island of Mauritius, its destination was Port Townsend in the state of Washington, and no intention then existed other than to sail directly for that port. The answer of the defendant claims that the reason the captain put into Honolulu was owing to the illness of the libellants; but it appears in the captain's log book that he was afraid to approach the coast short handed; the cook testified that they came in for three reasons, broken spars, illness of the libellants and shortness of provisions. It appears clearly that shortness of provisions must have been one of the strongest

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reasons for putting in to this port, as is evidenced by the extensive order for supplies which the captain made upon reaching here. It is plain if he were adequately supplied with provisions that he would not have made such an order.

It is uncontradicted that all of the original crew in the forecastle of the vessel became more or less sick on this voyage. Johnson went to the hospital at Mauritius and was left behind, the Italian taking his place. Exactly what was the matter with him was unknown. The Filipino had swelling of the limbs before reaching Honolulu, but he is now apparently well. Hall and Wood are still sick and receiving treatment at the hospital, but are improving. So far as the weight of the testimony shows, all the men were well when they shipped at New York. Every sailor, including the second mate and the Italian who shipped at Mauritius, testify that the food was too salty to eat; that it was otherwise ill prepared, and that they ate it with difficulty. It is admitted that the tea and coffee were prepared in one vessel, although the cook said he washed it out when he changed from tea to coffee; but one witness testified that both tea leaves and coffee grounds were mixed together in one pot for the men. It is admitted that the men drank rain water from the roof of the cabin a large part of the time from Mauritius here; but the captain testified that he has always done this with his men. If he did, unless from extreme necessity, it was contrary to law.

The cook testified that he set out a pail of water for the men each day, which pail, as he thought, held from two to two and a half gallons of water; when under the law, the four men were entitled to four gallons, or a gallon apiece, daily. The forecastle leaked badly. The men complained to the first officer, but he evidently did not interfere to ameliorate their condition. While the captain and the mate testified in a general way that the men were well fed, yet when their attention was called to the specific facts in the testimony of the other witnesses, they failed utterly to know anything about them.

Counsel in the case devoted much attention to showing the nature of the disease of the libellants. Two eminent physicians, produced as experts, differed as to its character, one being pos-

itive that it was beri-beri, the other equally positive that it was scurvy. The Court will not attempt to decide at this time what was the nature of this disease, as it is not necessary to do so in this action; but if bad sanitation, unwholesome food, a lack of proper vegetable food, a shortness of anti-scorbutics, together with water short in quantity and bad in quality, and with limited sleeping quarters, can in any case contribute to illness, they must have done so in this case, especially in the absence of proof of any other valid reason or of any other cause being shown for such illness.

I find as facts that both these men were well when they went on board the ship; that they left it dangerously ill; that they were improperly housed and badly fed and were not properly supplied with anti-scorbutics.

I am, therefore, of opinion, from a consideration of all the evidence, that these libellants are entitled to extra wages for a period of 120 days inclusive, being a part of the voyage from New York to Mauritius, and from Mauritius to Honolulu, for a shortage of the food and water supply of more than one-third the daily quantity, at the rate of one dollar a day, or \$120 apiece, and the said food and water being bad in quality for the same length of time, I hereby further allow each of said libellants the sum of one dollar a day for said 120 days, or \$120 apiece, making a total of \$240 apiece for each of the libellants, or \$480 for both, and the costs of this suit.

I do not allow any especial damages to the men for the extra suffering endured by them by reason of the illness shown to exist with both of them, as they are not yet out of the hospital, and it cannot now be shown what their reasonable damage would be, if any. So the question of special damages in this regard is not considered. This I do without prejudice to any future action on the part of the libellants.

Let a decree be entered in accordance herewith.

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UNITED STATES OF AMERICA v. ABRAHAM
MANASSE.

DATED: APRIL 22, 1902.

1. It is not necessary to prove motive for the commission of a crime.
2. Abusive words cannot justify an assault.
3. An assault has been defined to be an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another.
4. The word "maliciously" does not involve anything more than a wanton or wilful disregard of right.

CRIMINAL LAW. INDICTMENT UNDER SECTION 3869 R. S. U. S.

Robert W. Breckons, U. S. District Attorney, for the government.

S. F. Chillingworth, for defendant.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the Jury: The indictment in this case was found by the Grand Jury under Section 3869 of the Revised Statutes of the United States which provides a specified punishment for any person "who wilfully and maliciously assaults any letter carrier when in uniform while engaged on his route in the discharge of his duty as a letter carrier * * *"

An assault has been defined to be an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another. To commit such an assault "wilfully", is to commit it intentionally. To commit it "maliciously", in the language of the statute, does not require that there should be specific malice against the injured party in the mind of the defendant. The word maliciously does not involve anything more than a wanton or wilful disregard of right. It does not necessarily import ill will or a grudge against the party injured or a desire to be revenged. If there be malice, and if it existed as the cause of the unlawful act, it would aggravate the offense, but it is not a necessary element of the offense.

Therefore, if you should be satisfied from the evidence be-

yond a reasonable doubt, that the defendant intentionally and with a wilful disregard of right, wantonly attacked and assaulted Silva, the letter carrier, while he was in uniform, and while engaged in the discharge of his duty as a letter carrier of the United States, then you should find the defendant guilty as charged, although no malice on his part against the defendant Silva has been proven or shown.

The defendant in this case is presumed to be innocent until his guilt shall have been established beyond a reasonable doubt. And in case you entertain a reasonable doubt of his guilt, it will be your duty to acquit him. But by a reasonable doubt, I do not mean any possible or imaginary doubt.

I charge you that reasonable doubt is that state of the case in which after the consideration and comparison of the entire evidence introduced, the minds of the jury are in such a condition that they can say they feel an abiding conviction to a moral certainty of the truth of the charge.

The burden of proof is on the government in this case, but it is not necessary that you should look for any motive for the offense. The prosecution is not bound to prove a motive for the commission of a crime. Motive is one of the facts tending more or less to the identification of the accused or characterizing the criminal act, but it is never, as a matter of fact, essential.

No words however abusive, can justify an assault, and it is wholly immaterial what language if any the complaining witness may have used so far as the guilt or innocence of the defendant is concerned.

In reaching a verdict you are not to be controlled by the number of witnesses on one side or the other, but rather by the character of their testimony and the weight or conviction that it carries to your minds. The evidence of one truthful man testifying may in your judgment, outweigh the testimony of many witnesses.

In reaching a verdict in this case gentlemen, it must be by the unanimous consent of all your members.

You are to be the sole judges of the facts in the case. The law you must take from the court.

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UNITED STATES OF AMERICA *v.* MANUEL R. CASTANHA and FRANK CASTANHA.

DATED: APRIL 25, 1902.

1. Distiller; distilled spirits; okolehao.
2. Burden of proof primarily on government; when cast on defendant.
3. When presumption will arise that defendant was engaged in distilling.
4. Actual distilling not necessary to be shown; sufficient if possession, custody and control of still or distilling apparatus set up is shown.
5. Sale of spirits not necessary to be proven to warrant conviction.
6. Informers; credibility of testimony of.

CRIMINAL LAW. INDICTMENT UNDER SECTIONS 3258 AND 3260
R. S. U. S.

Robert W. Breckons, U. S. District Attorney, for government.

S. M. Chillingworth and *J. M. Vivas*, for defendants.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the Jury: The indictment in this case, upon which the defendants are called to answer, contains two counts:

1. That the defendants did on the 27th day of February, 1902, in the district of Hawaii have unlawfully in their possession and custody and under their control, a still and distilling apparatus set up without having the same registered as required by law.

2. That on the 27th day of February, 1902, the defendants did unlawfully carry on the business of a distiller without having given bond as required by law.

It is provided by Section 3258 of the Revised Statutes of the United States, that—

"Every person having in his possession or custody or under his control, any still or distilling apparatus set up, shall register

the same with the collector of the district in which it is, by subscribing and filing with him, duplicate statements in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still, and its cubic contents, the owner thereof, his place of residence and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector and the other transmitted by him to the commissioner of internal revenue. Stills and distilling apparatus shall be registered immediately upon their being set up.....”

Section 3260 of the Revised Statutes of the United States as amended in 1880, prescribes:

“Every person intending to commence or to continue the business of a distiller, shall, on filing with the collector his notice of such intention and before proceeding with such business, and on the first day of May of each succeeding year, execute a bond in the form prescribed by the commissioner of internal revenue, conditioned that he shall faithfully comply with all of the provisions of law relating to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions.....”

For a violation of either of said Sections, certain penalties are prescribed by the statute.

There are therefore, two questions to be considered by you in weighing the evidence in this proceeding.

First, did the defendants have in their possession, custody and control any still or distilling apparatus set up as is claimed by the prosecution, and if so was said still or distilling apparatus registered as required by law; and

Second, did the defendants unlawfully carry on the business of a distiller? In other words, were they or either of them distilling spirituous liquors in any form, and if so had they given the bond required by the laws of the United States?

In this connection, gentlemen of the jury, it might be well to read for your instruction, the definition of the term “distiller” as given by Section 3247 of the Revised Statutes of the United States, to wit:

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"Every person who produces distilled spirits or who brews or makes mash, wort or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who making or keeping mash, wort or wash, has also in his possession or use a still, shall be regarded as a distiller."

"Wort has been defined to be "New beer unfermented or in the act of fermentation"; "Wash" the fermented wort from which the spirit is extracted", while "mash" is defined as "a mixture of ground malt and warm water". (Webster).

But to make a person a distiller under the provisions of Section 3247 aforesaid, it is not necessary that the distilled spirits must be produced from either mash, wort or wash, but he may be one who "by any process of evaporation separates alcoholic spirit from any fermented substance."

It is further provided by Section 3248 of the Revised Statutes of the United States, that—

"Distilled spirits, alcohol and alcoholic spirit, within the true intent and meaning of this Act is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance....."

Such, gentlemen, are the legal and accepted definitions of what under the law is understood by "a distiller" or "distilled spirits". You are therefore to bear this law in mind, when considering the facts shown upon the hearing of this case, of which facts you are to be the sole judges; the law you are to take from the court.

And in considering the evidence in this case, you are to give to the defendants the benefit of all reasonable doubts, remembering always that innocence is presumed under the law until guilt is proven. You are not compelled to believe any witness who from his interest in the case you may not think has told the exact truth. Nor are you to be controlled by the number of witnesses who may have testified on one side or the other:

but rather by the conviction which the testimony may convey to your minds of the truth or falsity of the charge.

It has been shown from the testimony of a witness introduced by the government, that the five gallon demijohn of distilled liquor produced in evidence and alleged by the government to have been found on the premises of the defendant at the time of the making of the raid thereon, and called in the language of the natives "Okolehao" is a low grade of alcohol, running 70 per cent. It is a matter of common knowledge that this alcohol, or "okolehao" is the result of the distillation of the fermented ti root of which fermented ti root, quantities were produced in evidence as having been found on the premises of the defendant together with the other exhibits introduced by the government.

Primarily the burden is on the government to establish the guilt of the defendants, but if it should appear from the evidence that the defendants had in their possession or custody or under their control, a still or distilling apparatus or parts of the same, and if it should appear from the evidence that they had not registered said still or filed the bond required by law, then the burden of proof is cast upon them to show that they did not have the said still set up and that they were innocent of intent to manufacture and had not manufactured distilled spirits from the said still or distilling apparatus.

In this case, it is clear from the testimony of Mr. Chamberlain, the Internal Revenue Collector, that he had no record either of the registry of a still by the defendants nor of any bond given as required by the law, hereinbefore read to you.

I therefore instruct you, that if you should believe from the evidence beyond a reasonable doubt, that the defendants had in their possession or under their custody or control on their premises, a still or distilling apparatus, and that distilled spirits which were not packed in the usual commercial packages or that were not stamped as required by law, were also found thereon; and if you also believe from the evidence that there was on said premises together with said still and said distilled spirits, ti roots which had been subjected to fermentation, notwithstanding that the evidence may show that the parts of said still were

scattered about the premises, yet there is a strong presumption that the defendants had a still set up and that they had been engaged in distilling without first fulfilling the requirements of the law. It is not necessary in order to obtain a conviction under Section 3258, that the government should prove that the defendants were actually engaged in distilling. The law simply requires that they shall be in the possession, custody and control of a still or distilling apparatus set up.

It is not necessary for the government, under the second count of this indictment, in order to prove that the defendant Manuel R. Castanha was a distiller, to show that spirits were distilled for sale, for, within the meaning of the law, any person who distills spirits, though not for sale, carries on this business of a distiller.

And in requiring you to believe from the evident that such facts existed, beyond a reasonable doubt, is meant gentlemen, that after an entire comparison and consideration of all the evidence in the case, your minds are left in that condition in which you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge. Such is a reasonable doubt.

Errors of witnesses as to dates and distances or as to immaterial points may be noted in this as in other cases, but it is your duty to harmonise all conflicting testimony so far as you can fairly do so. The fact is that in most important cases good men often honestly differ as to some of the facts and so the Court instructs you to consider all the facts, and harmonize the conflicting testimony if possible to do so.

Gentlemen of the jury, in this case something has been said by counsel to the effect that certain testimony offered by the government is open to suspicion on the ground that the witnesses giving it were informers, and for that reason should not be believed.

You are instructed that it is the right and the duty of every citizen to report to the proper officers any violation of the law, and the fact that any persons do so report is not one which in any manner affects their credibility, unless it should further appear that they have some interest in the penalty to be recov-

ered from the person on trial or receive some compensation from the parties in interest.

In this case, therefore, it not appearing in any manner that any witnesses testifying on the part of the government were interested in any penalty or had any share therein or any other compensation, you are instructed that if they did give information to the officers, it does not in any manner affect their credibility.

Gentlemen of the jury, as the prosecution has dismissed the charge against the defendant, Frank Castanha, you will only consider the charges as against the defendant Manuel R. Castanha, the father of the boy, Frank, and the evident master of the premises raided, and who is the real party in interest.

In rendering a verdict in this case, it will require the unanimous assent of all your members.

And in rendering your verdict, gentlemen, you must find the defendant either guilty or not guilty upon each of the counts of the indictment.

Note: To the same effect, see cases of *U. S. v. Tom Pong*; dated: Oct. 16, 1902; *U. S. v. Kodera and Ogi*; dated: April 17, 1903 not reported.

UNITED STATES OF AMERICA *v.* ESTATE OF BERNICE PAUAHI BISHOP, deceased, and JOSEPH O. CARTER, *et al.*, Trustees under the will of BERNICE PAUAHI BISHOP, deceased; OAHU RAILWAY AND LAND COMPANY, LIMITED, a corporation; THE DOWSETT COMPANY, LIMITED, a corporation; THE HONOLULU SUGAR COMPANY, a corporation; HONOLULU PLANTATION COMPANY, a corporation; CHOW AH FO, JOHN LI ESTATE, LIMITED, a corporation; WILLIAM G. IRWIN, OAHU SUGAR COMPANY, LIMITED, a corporation; BISHOP & COMPANY, a copartnership.

MAY, 1902.

DECIDED: MAY 13, 1902.

1. Where no rule of law has been violated, a new trial will not be granted after two concurring verdicts, if the questions to be tried depend wholly on matters of fact, although the verdict is, in the judgment of the Court, against the weight of the evidence.
2. Where a verdict of \$105,000 damages was set aside and a new trial granted in an action to condemn the leasehold interest of defendant in 561.2 acres of land desired by the United States for the purposes of a Naval Station, upon the failure of the defendant, in pursuance of the order of the Court, to elect to remit \$30,000 from the amount of the said verdict; and upon the second trial of said action the jury rendered a verdict assessing the damages of defendant in the sum of \$102,523, which verdict was for practically the same amount assessed by the verdict on the former trial, a motion for a new trial on the part of the plaintiff denied, although the Court held that it was discretionary with it to again set aside the verdict under the circumstances of this case, and grant a new trial upon the same terms as in the first trial of the action.

EMINENT DOMAIN. MOTION FOR NEW TRIAL.

J. J. Dunne, Assistant U. S. District Attorney, for plaintiff.
Hatch & Silliman, for defendant, Honolulu Plantation Company.

Honolulu Plantation Company case.

ESTEE, J. On the third day of March, 1902, the above case came on for the second trial before a jury. Witnesses were produced and sworn for both sides, and the case heard. On the 11th day of March, 1902, the Jury returned a verdict in favor of the complainant condemning the leasehold interest in the 561.2 acres of land as described in the bill of complaint, and also rendered a moneyed verdict in favor of the defendant, assessing the just compensation for the said leasehold interest of the defendant in said lands at the sum of \$102,523.

On the 20th of March, 1902, a notice and motion for new trial was made and filed on the part of the complainant in the action. The grounds of such motion were stated generally to be the following:

1. Insufficiency of the evidence to justify the verdict.
2. That the verdict was contrary to and against the law and the evidence.
3. That said verdict is not sustained by either the law or the evidence, or the weight of the evidence herein.
4. That the said verdict is excessive in this, that it attempts to award excessive, unreasonable and inconsistent compensation or damages herein.
5. That the verdict is contrary to and against the charge of the Court herein.
6. Errors in law occurring at the trial and excepted to by the plaintiff.

An assignment of errors under each of said grounds is also specified, which it is unnecessary to herein set out.

The hearing on said motion for new trial was postponed from time to time but was finally submitted on briefs on the 5th day of May, 1902.

This case has been tried twice before a jury, the object being to fix the value of the defendant's leasehold interest in the 561.2 acres of land described in the complaint; and in both cases the verdicts were practically the same, the difference in amount being nominal.

The verdict in the first case was \$105,000 and it was deemed excessive by the court, who for that reason granted a new trial unless the defendant would accept a diminished amount, namely, \$75,000. This the defendant declined to do and the second trial was therefore had, resulting in the verdict of \$102,523 as before stated. This amount the Court also believes to be excessive above the sum of \$75,000, in view of all the testimony in the case as it presented itself to the mind of the Court. And while it seems to be well settled that under the law the court can again set this verdict aside and grant a new trial upon the same terms as on the former trial if in its discretion it sees fit to do so, yet the consensus of the best judgment of the courts as found in the decisions is, that where no rule of law has been violated, the Court will not after two concurring verdicts grant a new trial if the

questions to be tried depend wholly on matters of fact, although the verdict is in the judgment of the court against the weight of the evidence. *Joyce v. Charleston Ice Manufacturing Co.*, 50 Fed. 371-5. *Clark v. Barney Dumping Co.*, 109 Fed. 235.

I may say in this case as was said by the Court in the case of *Frost v. Brown*, 2 Bay. 139 (S. C.), where, as in the case at bar, two trials were had resulting practically in the same verdict, that—

"Although I would never surrender a plain and certain rule of law to the caprice of a jury or any number of juries, yet in a case where the law is complicated with facts so that the construction and application of it must depend on the findings of facts, two concurring verdicts even against the opinion of the judges, ought to be conclusive." I have made an examination of the very lengthy assignment of errors of law alleged to have occurred at the trial of the case, and have read with much care the elaborate brief of the counsel for complainant in addition to the brief of defendant's counsel,—I do not, however, deem it necessary to go into an exhaustive discussion of those alleged errors. No reason has been presented to me which I think is sufficiently forceful to lead me to change my views as indicated by my rulings at the trial; and while some slight errors may have and doubtless did creep into the record, yet I find none which in my judgment were material or so prejudicial to the interests of the complainant as to have materially influenced the verdict of the jury."

The motion for a new trial is therefore denied.

UNITED STATES OF AMERICA *v.* THE SCHOONER
"KAWAIULANI", her tackle, apparel, etc.

DECIDED: JUNE 20, 1902.

1. In a proceeding to condemn as forfeited, under Section 3450 R. S. U. S., the schooner Kawaiulani, for being used in the removal of certain distilled liquors whereon a U. S. revenue tax was imposed where such liquors were found concealed on said vessel, and it

appeared that the same were deposited and secreted thereon by the Captain thereof, acting under a verbal lease from the owners and admitted to be rightfully in possession of the said vessel, and who admitted to the Collector of the Internal Revenue, who seized the liquor and the vessel, that he knew that it was contrary to the laws of the United States to manufacture distilled spirits where the tax was not paid to the Internal Revenue Department; and it appearing that no taxes have ever been paid in these Islands to that Department on this class of liquors;

Held, that the intent of the Captain of said vessel to defraud the Government of the United States of the tax imposed on such liquors is clear, and by depositing and concealing the same on said schooner Kawaiulani, a forfeiture of said vessel was worked.

2. Okolehao has a definite meaning in the Territory as belonging to a special intoxicating liquor distilled from the ti root, and where it was shown that the okolehao seized in this case was obtained somewhere in the mountains on the other side of the Island of Oahu near a place called Kahana, the presumption is that it was made in the Islands.
3. Under Section 3333, R. S. U. S., the burden of proof in this class of cases is upon the claimant of the property seized.

INTERNAL REVENUE.

{ Libel of Information under Section 3450 R. S. U. S. to condemn vessel as forfeited to the United States.

Robert W. Breckons, U. S. District Attorney, for government.
C. W. Ashford, for claimants.

ESTEE, J. This is a libel of information based upon Section 3450 of the Revised Statutes of the United States and brought to condemn as forfeited to the United States, the schooner "Kawaiulani", seized in the port of Honolulu, by the Collector of Internal Revenue, for being used in the removal of certain distilled liquors whereon a United States tax was imposed, and which liquors were deposited and concealed on board said vessel by one John Moses Ulunahela, the master thereof, with intent to defraud the United States of the said tax.

It is claimed that one Hong Quon and one L. Apana were at the time of the seizure of the said vessel, the owners of the same; the said John Moses Ulunahela, acting as their lessee in command of the said vessel as its master, under an oral lease.

JUNE, 1902.

It is further admitted that the Collector of the Internal Revenue found locked away on board the said schooner, two one-gallon demijohns of a native liquor, commonly known in the islands as "okolehao," upon which it is claimed by the government no tax has been paid as required by law.

It is claimed by the said alleged owners of the vessel, that admitting that the said schooner had on board deposited and concealed, the said okolehao, yet as they were utterly ignorant of the fact and entirely innocent of any connivance at the said alleged act, that they should not be made to suffer for the act of another.

Section 3450 of the Revised Statutes provides in part, as follows:

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils or vessels proper or intended to be made use of or in the making of such goods, or commodities are removed or are deposited or concealed in any place with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities shall be forfeited; and in every such case..... every vessel, boat, cart, carriage or other conveyance whatsoever, and all horses or other animals and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited....."

It appears from the testimony of Roy H. Chamberlain, the Collector of Internal Revenue, and of Mr. Handy, the United States Deputy Marshal, who made the seizure, on May 24th, 1902, that they, in company with a Deputy Internal Revenue Collector, went down to the wharf in Honolulu, where the vessel was tied up, having just arrived from Kahana, a point on the Island of Oahu; that the captain was aboard of the vessel and the Collector made himself known to him in his official capacity and asked him if there was any okolehao being made at Kahana. to which the Captain replied there was, but upon being interrogated as to whether there was any on board his schooner, said "no". It further appears that the Collector asked him if he knew what okolehao was, and he said he did, and upon being

questioned further as to whether he knew it was contrary to the laws of the United States and to the Internal Revenue department to manufacture distilled spirits where the taxes were not paid to the Internal Revenue Department, he said he did know it.

The Collector then served him with his search warrant, and went down into the cabin and proceeded to make a search of the vessel for okolehao, the Captain denying up to that time that he had any aboard the vessel, but upon the Collector making a strenuous search and commencing to pull up a lot of sail cloth, the Captain finally produced some empty bottles and one that had a small amount of liquor in it, and he stated that he had it for his own use and for his men. Being asked if he had any more, he answered no. The Collector continued his search, whereupon Captain Moses went to a locker in the side of the vessel and unlocked the cover which had a padlock on it, and took out a sack and pulled out a one-gallon demijohn of the liquor, and then went down and got another. The Collector made a further search, but found no more.

It appears from the testimony of one Peter Makia, a witness introduced by the government, and who testified that he lived at Kahana, that he saw the captain of the vessel on the 22nd day of May, 1902, on the porch of his house at Kahana, and at the captain's request, sent for and got him the liquors that the captain wanted, and had asked him to get for him, namely, some okolehao; that he, Makia, went to a Japanese for the liquor; that the Japanese went up into the mountains and was gone three hours, coming back with the two demijohns of the liquor; (which were produced in Court) and which were taken down to the schooner by the captain and a German boy.

It seems to be clear from the testimony that Captain Moses knew that he was violating the law when he received and took this liquor aboard of his vessel. The circumstances of the case all tend to show a knowledge of the law and an intent to evade its provisions. He denied the existence of the liquor aboard the vessel, as is shown by both the testimony of Chamberlain and

the Deputy Marshal, and then produced it when he saw it was certain to be discovered.

No testimony was introduced whatever on the part of the claimants, save that of one of the alleged Chinese owners of the vessel, a Chinaman who claimed the schooner seized and who professed to be ignorant of the transactions of the master thereof in relation to this liquor. It is admitted, however, that the master of the vessel was acting as such under a verbal lease from these claimants and that he was rightfully in possession of the boat. In fact it is tacitly admitted that the main facts of the libel are true.

In the absence of any satisfactory explanation, it must be presumed from an examination of all of the facts, that Captain Moses intended to defraud the Internal Revenue Department of the government of the tax imposed on such liquors, and a forfeiture of the vessel is thereby worked. Section 3450 R. S. U. S. *United States v. Brewery Utensils*, Fed. Case No. 14-641.

Some discussion was had tending to show that no proof was made as to this liquor being of an illicit character, or that it was produced in the United States since the 14th day of June, 1900, the date when the Act of Congress for the government of the territory went into effect, but not the date of annexation. It was shown conclusively that the liquor involved in this inquiry was okolehao, and that term has a definite meaning in the territory as belonging to a liquor distilled in the Islands from the dried ti root. The Supreme Court of the territory in the case of the *Republic of Hawaii v. Akoni*, 11 Haw. 53, held that "okolehao is a well known spirituous liquor distilled from the ti root, and very intoxicating."

It was also shown at the trial where this liquor was obtained, to-wit; somewhere in the mountains on the other side of the Island of Oahu, near a place called Kahana. The presumption is that this liquor was made in these Islands. The testimony of the Collector of the Internal Revenue shows that no tax has ever been paid on any of this liquor distilled in the Islands, although it is a matter of common knowledge that it is being

made constantly. It is difficult to determine at exactly what period of time this liquor was manufactured, but it was produced in an illicit and secret manner. All prosecutions on the part of the government would be unavailing, and collections under the revenue laws would be defeated, if the government was compelled to prove when illicit liquors were produced. Of necessity, it was produced in this territory because it is distilled from the ti root, which is grown here and no testimony appears showing it is grown elsewhere.

And again, the burden of proof in this class of cases is upon the claimants of the property seized. Section 3333 R. S. U. S.; *United States v. 508 Barrels of Spirits*, 5 Blatch. 407 Fed. case No. 15,113; *United States v. 6 Barrels of Distilled Spirits*, 5 Blatch. 542, Fed. case 16, 294; *Boyd, et al v. United States*, 14 Blatch. 317; Fed. case 1749; *United States v. 78 Barrels*, 7 Int. Rev., Rec. 4; Fed. case, 16,257.

A consideration of the facts that influenced Congress in the passage of these laws, apparently so harsh in their nature, enables us to appreciate the necessity for the same. The many opportunities afforded to evade the internal revenue laws, and the numerous violations thereof, doubtless induced Congress to pass these stringent measures, so as to not alone punish the guilty trespasser against the law, but also to impress upon the owners of property the necessity for a vigilance in the selection of their agents or lessees or those to whom they intrust the same, that the said property may not be put to illegal purposes. In the making of these laws, Congress trusted to the strong sense of self-protection that actuates men, to impress upon them a prudence and a vigilance that would be a factor in the prevention of many of these frauds upon the government.

Thus, in the case of the *United States v. Two Horses*, Fed. Case No. 16,578, 9 Ben. 529, the Court said:

"The reason why this express provision was made in respect to the forfeiture of things used in removing spirits contrary to law, was to link the fate of the vehicle with that of the article conveyed in order to deter parties from putting their vehicles at the disposal of those who would be likely to use them for the pur-

poses of fraud. It is expected that the owner of property will see to the uses made of it at his peril." *United States v. Two Barrels of Whiskey*, 96 Fed. 479; *United States v. Two Bay Mules*, 36 Fed. 84.

It appears from the decision of the Supreme Court of the territory hereinbefore referred to that okolehao is a native liquor, a strong intoxicant and a product of these Islands. None of this class of liquors has ever paid a tax to the government in this territory so that no tax could have been paid on this particular liquor.

Counsel for libellees submit the proposition that this liquor may have been smuggled into the territory and adds that there was no evidence that it was not so smuggled, and hence assumes that it might have been brought into the territory. That was no part of the evidence to be offered by the government, but was a matter of proof for the claimants, if any defense of that nature was to be relied upon. The further point made by counsel that the time of the production of this liquor is all important, because the territorial enabling act went into effect on June 14, 1900, and that it must appear affirmatively that the liquor was made since that date, or it could not be considered a production of the United States, and was therefore a foreign instead of an American product, may be answered in the same manner, that that proposition too, if made, was for the proof of the claimants, and no evidence was offered on their part.

The right of taxation for national purposes is a right inherent in the national sovereignty, and is unlimited except by national laws. This territory may and does levy taxes for municipal purposes, but the nation levies and collects taxes for national purposes, and the laws providing for internal revenue collections are national laws binding alike on the people of the states and territories. The courts have nothing to do with the character or the policy of these laws; the single duty of the courts is to enforce them. In pursuance of that duty the court holds in this case, that from all the testimony presented, okolehao is distilled spirits and a most dangerous intoxicant; that the liquor in question here is okolehao; that it was made in the territory; that

it was illicitly manufactured and has paid no internal revenue tax, and that Captain Moses knew these facts when he secreted it on board the schooner Kawaiulani. That the depositing, secreting and removal of this liquor on board his said vessel was done with intent to defraud the government of the United States of the tax due upon it. No testimony appearing to the contrary, this court will presume that from all the circumstances surrounding the case the liquor was distilled since the annexation of the territory by the United States, and that in any event it was liable to the tax prescribed by the laws of the United States.

Let a judgment of condemnation of the vessel Kawaiulani, her apparel, tackle, etc., be entered in accordance with this opinion, with costs of suit.

HANS LORENZEN v. INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a corporation.

DECIDED: JULY 15, 1902.

1. Where, in the process of transferring sugar from the hold of one ship into the hold of another ship, with the usual and customary appliances, a sling containing some 1,250 pounds of sugar was lowered unexpectedly by an employe of the defendant on to the deck of the ship into whose hold the sugar was being loaded, severely injuring the mate of said ship, who made ineffectual attempts to get out of the way of the descending sugar, and some evidence was introduced as to the giving of warnings of the coming of the sugar by the officers of the defendant; Held, that these warnings were not shown to have been brought home to the injured person. And further held, that "even if the warnings had been heard by him and disregarded, thus showing a degree of negligence on his part, that would not have relieved the defendant from the results of its negligence, if by the exercise of reasonable care it could have avoided the consequences of libellant's negligence."
2. While the theory that every man must look out for himself prevails, in so far that he shall not place himself deliberately in the way of injury, yet the law contemplates that every man, in his relation towards others, shall conduct himself with reasonable care and prudence, no matter what the imprudence of others may be; and if, by so conducting himself, he can avoid injury to the

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- person or property of another, he is liable for any injury resulting from a neglect to exercise such reasonable care and prudence.
3. Where an attempt was made to show that libellant contributed to his injury by walking in the direction of the sling load of sugar as it was swinging rapidly towards him, *Held*: While it is true that in moments of great personal peril a man may, under the excitement of the moment, fail to act with the cool, deliberate judgment that may characterize him in the ordinary occurrences of life, but under the stress of excitement may do exactly the reverse of that which is best for his safety, yet courts do not as a rule treat such conduct as contributory negligence.
 4. Where it was shown that after the sling load of sugar was hoisted out of the hold of the ship and suspended from the donkey fall, that the strain was then transferred from the donkey fall to the burden line, and the duty of the burden man was to lower away slowly to the deck of the ship into whose hold the sugar was being loaded, and that in order to control the line, the burden man was obliged to take sufficient turns of this line round a post, the evidence that (as was shown by the libellee's own witnesses), at the time of the accident, he took but three turns, thereafter taking four, when no further difficulty was experienced in controlling the line, *Held*, to be a very significant fact in considering the cause of the injury.
 5. The fact that the officers and crew of the defendant's ship had exclusive control of the appliances and gear being used in transferring the sugar from one ship to the other, is an important element in considering this class of cases.

IN ADMIRALTY. ACTION FOR DAMAGES FOR PERSONAL INJURIES.

J. J. Dunne and R. W. Breckons, proctors for libellant.
Smith & Levis, proctors for libellee.

ESTEE, J. This is an action for damages in the sum of \$10,240, for injuries received by libellant while on board the American barkentine "Irmgard" when said barkentine was anchored in the harbor of Honolulu about seven or eight hundred feet off shore, and while the "Noeau," a steam vessel owned and operated by the defendant, the Inter-Island Steam Navigation Company, Limited, a corporation, was anchored alongside of the said "Irmgard" and was discharging sugar into the "Irmgard" from the hold of the "Noeau" by means of machinery and appliances belonging to the said "Noeau."

The complainant was first officer of the "Irmgard;" that with

the exception of having given orders to the crew of the "Irmgard" to prepare the hatch with the chutes for the reception of the sugar, he had nothing whatever to do with the discharging or unloading of the said cargo of sugar into the hold of the "Irmgard."

It seems that between nine and ten o'clock in the morning of January 30th, 1902, the "Noeau" came out alongside of where the "Imgard" was lying with her head to the shore, and anchored alongside of the "Irmgard," the "Noeau" being headed off shore, so that they lay port to port. That after the "Noeau" came alongside of the "Irmgard" the crew of the "Noeau" commenced preparations to hoist the sugar out of the hold of the "Noeau" and to discharge the same into the hold of the "Irmgard."

It is admitted that the following is the process by which the sugar was transferred from the "Noeau" to the "Irmgard," to-wit:

Said "Noeau" had two masts, and from the foremast leading aft, was a wire rope. Attached to this span, and so placed as to be directly over said "Noeau's" hatch, was a block, and through this block a fall was rove, one end of which was fitted with a hook, while the other end led to the steam winch aboard the "Noeau." The purpose of said hook was to attach said fall to the sling loads of sugar for the purpose of lifting them from the hold of said "Noeau;" attached to the foremast of said "Noeau" was a gaff with a block made fast to its outer end, and through this block was rove a rope commonly known as the burden line. This burden line was made fast to the aforesaid donkey fall and permanently connected with it and designed to work with it. The object of said donkey fall was to hoist the sling load out of the steamer hold; and the object of the burden line, connected as aforesaid with said block at the end of said gaff was to swing the sling load from over the "Noeau" to over the "Irmgard," from which deck said sugar would pass into the hold of the "Irmgard" by chutes. As the sling load of sugar rises out of the hold of the "Noeau," the member of the crew of said "Noeau" in charge of said burden

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line takes in the slack thereof, so that when the "Noeau's" winch eases up on the donkey fall the weight of the sling load is received by the said burden line and as said burden line lowers the sling load to the deck of the "Irmgard," the member of the crew of the "Noeau" in charge of the winch, then slowly slacks away on said donkey fall, and thus said donkey fall does the work of transferring said sugar, until each sling load is transferred to the said burden line, and thereafter the work is completed by the burden line.

It further was brought out on the hearing that the duty of the man at the burden line was to wrap the said burden line around a post or dolly head, so-called, so as to ease down the sling load of sugar on to the deck of the "Irmgard."

It is admitted that each sling load of sugar made up in this cargo, contained ten bags, each bag of the average weight of 125 pounds.

It is also admitted that the libellant was neither a member of the crew of the "Noeau" nor a fellow servant or workman of any member of said crew; and that he was not engaged in transferring the sugar from the "Noeau" to the "Irmgard;" that no machinery or appliances used were owned or operated by the "Irmgard" nor was any member of her crew used in transferring this freight to the "Irmgard."

It further appears that when the first sling load of sugar was being transferred from the "Noeau" to the "Irmgard," and was over its deck, it struck the libellant, who was on the deck of the "Irmgard," knocked him down, rendered him senseless and broke his right leg below the knee; that libellant was therafter removed to the Queen's Hospital in Honolulu, where he remained, undergoing medical treatment until May 5, 1902.

The question involved in this case is one of negligence. Conceding the fact to be admitted that libellant received the injury for which he claims damages, was such injury the direct result of the defendant's negligence, or was there such contributory negligence on the part of the libellant as to defeat his recovery of damages?

It is a well known principle of law in cases of this character that negligence of the plaintiff must have contributed directly to produce the injury in order to defeat his recovery. In other words, his negligence must have been such that but for it the injury could not have happened.

Wharton on Negligence, 302; *Railroad Company v. Jones*, 95 U. S. 439; *Mark v. Hudson*, etc., *B. Co.*, 56 How. Pr. 108; *Harvey, Administrator, etc., v. The New York Central and Hudson River R. R. Co.*, 19 Hun. (N. Y.) 556; *Kennard v. Burton*, 43 Am. Dec. 249; (25 Me. 39); *Haley v. Earl*, 30 N. Y. 208.

And the principle is equally well established, that the negligence of the defendant cannot be excused on the score of the negligence of the plaintiff. While the theory that every man must look out for himself prevails in so far that he shall not place himself deliberately in the way of injury, yet the law contemplates that every man in his relation towards others, shall conduct himself with reasonable care and prudence, no matter what the imprudence of others may be; and if by so conducting himself he can avoid injury to the person or property of others, he is liable for any injury resulting from a neglect to exercise such reasonable care and prudence.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 429; *Needham v. S. F. & S. P. R. Co.*, 37 Cal. 409, 419-20; *Essery v. S. P. Co.*, 103 Cal. 541, 544-5; *Lee v. Market St. Ry. Co.*, 135 Cal. 293, 295-6; *Baltimore & O. R. R. Co. v. Hellenthal*, 88 Fed. 116, 120-1.

"It is correctly stated that generally between persons standing in no particular relation to each other, as in this case, that alone is reasonable care, which in the judgment of men in general, is proportionate to the probability of injury to others; and, consequently, he who does what is more than ordinarily dangerous is bound to use more than ordinary care." (*Morgan v. Cox*, 22 Mo. 373; *Durant v. Palmer*, 29 N. J. L. 544, 546.)

"The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary pru-

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dence and caution would use if his own interests were to be affected and the whole risk were his own." (*The Nitro-Glycerine Case*, 15 Wall 524.)

It is claimed in this case, as in almost all cases of a similar character, that the libellant's injury was due to his own negligence and carelessness; and that in this instance the negligence consisted in not only not heeding the alleged warnings from the "Noeau," at or about the time the first sling load of sugar was coming over to the "Irmgard," but in apparently deliberately placing himself in danger of losing his life or limb by walking toward the sling load of sugar as it was swinging rapidly toward him.

It must be confessed this latter contention of counsel for defendant, does not appeal to the common sense of the Court or its experience of men in general. While it is true that in moments of great personal peril, a man may under the excitement of the moment fail to act with the cool, deliberate judgment that may characterize him in the ordinary occurrences of life, but may, under the stress of excitement, do exactly the reverse of that which is best for his safety, yet Courts do not as a rule treat such conduct as contributory negligence.

"A person of ordinary intelligence will not purposely expose himself to danger." *Cassidy, Administrator, etc., v. Angell, Town Treasurer*, 12 R. I. 447. "The instinct of self-preservation is strong in human nature and stands for proof of care" *Allen v. Willard*, 57 Pa. St. 374; *Cleveland and Pittsburg R. R. Co. v. Rowan et ux.* 66 Id. 393; *Thomas, Adm'r, etc., v. The Delaware, Lackawanna & Western R. Co.*, 8 Fed. Rep. 729, 731.

But is such contention borne out by the testimony in this case? While it is true that Porter, the engineer of the "Noeau," testified strongly that Lorenzen stepped forward two and a half feet to meet the sling of sugar, and was struck in the front and knocked down by the sling load, yet he is the solitary witness in the case who so testified; and as I have before stated, such a statement of fact does not appeal to the reason of the Court aside from a consideration of the other flatly contradictory evidence

upon the same point. Lorenzen testified to the effect that he had been sitting on the rail of the "Irmgard" when he saw the sugar was about to be lifted out of the hold of the "Noeau," but before it had reached the top of the hatch, he got down and walked forward, away from the after hatch of the "Irmgard," where the sugar was supposed to land; that he heard nothing in the way of warning from the "Noeau" until a voice called out, "hold on, hold on," when he looked and the sling load was upon him, struck him on the shoulder, when he fell under its weight, and the load again struck him on the knee and broke his right leg.

Captain Schmidt of the "Irmgard" testified that at the time the accident happened "He (Lorenzen) was doing nothing; I did not observe him carefully; I was watching the sugar more than the mate." It appears from the deposition of Mr. Krause, the second mate of the "Irmgard," that he testified on this point as follows:

Q. "When the first sling load of sugar came over, what was he (the libellant) doing?

A. Walking.

Q. In what direction was he going?

A. He was going forward at the time.

Q. On which side of the ship?

A. On the port side.....

Q. Did you notice where the sugar struck him?

A. Right back of the shoulder.

Q. What did it do to him?

A. Rolled him over, knocked him down and rolled him over.

.....

Q. What knocked him down, the sugar or the fenders?

A. The sugar.

Q. Did you notice whether he made any attempt to look out?

A. Yes, sir, he did.

Q. What was it?

A. He tried to run forward.

Q. And it struck him before he got forward?

A. Yes, sir."

Peahi, a stevedore, then working on the "Irmgard," testified that "when the sugar was in the act of being slung over, the mate began to move forward towards the bow of the 'Irmgard,' when the sugar struck him on the shoulder; that he fell down by the blow of the sugar and as he went down the sugar went right on his leg and broke his leg." Punaloa, also a stevedore, then on the "Irmgard," testified that while they were fixing the chutes on the "Irmgard," "the mate left the hatch and walked—that is, went towards the bow in a sort of diagonal way, when the sugar struck him, it struck him on the shoulder blade;" while Oomi, another stevedore, testified practically to the same effect, "that he was walking forward when he was struck by the sling load of sugar, and he was struck from behind."

In addition to the foregoing, the testimony of Gahan, the tally clerk of Schaefer & Co. on board the "Noeau," taking tally of the sugar at the time of the accident, is indirectly strongly corroborative of the fact that libellant was going forward when struck by the sling of sugar, and is in contradiction of the testimony of Porter, the engineer of the "Noeau." Gahan says that "when the sugar was coming over, he (Lorenzen) was ten feet, seven or eight feet, or nearly ten feet from the after hatch of the 'Irmgard;'" and when he was injured, "he was lying on the deck thirteen or fourteen feet from the forward part of the hatch." Kaanana, the man from the "Noeau" sent over to sew any broken bags, testified that when he first saw Lorenzen he was standing at the rail of the "Irmgard," somewhat forward of the hatch; but he afterwards saw him lifted up from a place about nine feet forward of the hatch, not the place where he saw him first.

There seems to be no reasonable explanation for this change of position testified to by both of these witnesses, other than upon the legitimate assumption that Lorenzen had moved forward and was moving forward when the sugar struck him. I think it is clearly in evidence that the libellant did all he could to avoid the injury. The evidence of the physician who at-

tended him directly after the injury is also corroborative of the blow being from behind. Dr. Sinclair testified that the bruise upon the shoulder "was excessively severe."

Upon this question of warnings having been given, the evidence is conflicting; no two witnesses testifying to a like state of facts. While I am inclined to think it possible that some sort of warning may have been given of the coming over of the sugar, yet it would be difficult to elucidate from the mass of contradictory testimony just what the warnings were or by whom given; some of the witnesses testifying that the warnings came from the "Irmgard" and others that they came from the "Noeau"; while many testify that there were no warnings, other than the words "hold on, hold on," from Captain Petersen to the burden man. Captain Petersen of the "Noeau" testified that he said "look out the sugar is coming" when the sugar was in the air, after it had been lifted out of the hold of the "Noeau;" Porter, the engineer of the "Noeau," says the captain (Petersen) called out "stand clear"; while the tally clerk, Harry Gahan, testified that Captain Petersen called out "to look out on deck." Schultz, the mate of the "Noeau", who did not see the accident, said that while in his room, he heard a lot of yelling, "get out of the way, stand clear."

But no one of the witnesses introduced by plaintiff testified to having heard anything but the "hold on, hold on" referred to by Lorenzen, just before the sling load struck him. Captain Schmidt of the "Irmgard," who had no reason to be other than a perfectly disinterested witness, testified as follows:

"Q. Before this first sling load of sugar was transferred from the 'Noeau' to the 'Irmgard', did you hear anybody, did you hear Captain Petersen or anybody call out or say anything relative to the sugar coming aboard? (A) Not that I remember before the first sling load came over. (Q) You did not hear anything? (A) Not before the first load. (Q) When was the first time you heard anything? (A) The first time I recollect hearing anything was when I heard 'hold on, hold on'; that was the first time I recollect."

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And Mr. Krause, the second officer of the "Irmgard", also bears out the testimony of Lorenzen in this regard, as he swore as follows:

"Q. At the time of this occurrence or at the time of this matter of which we have just been talking about, or just previous to that time, did you hear any shouts or any calls from anybody aboard the 'Noeau' as relative to the fact that the sugar was coming aboard the 'Irmgard'? (A) I heard a call from our vessel 'to look out'.....(Q.) Did you hear Captain Petersen call out? (A.) No, sir. (Q.) Didn't you hear anybody from the 'Noeau' call? (A.) No, sir."

Peahi testified that he heard nothing from the "Noeau" just before the sugar came over; while Punuloa upon being asked whether "when the sugar was being suspended from the donkey fall just above the hold of the "Noeau" or shortly after, he heard Captain Petersen say anything", he answered "no, he did not."

The court is forced to the conclusion that these alleged warnings, if given at all, were not brought home to the libellant, and it appears clear that they were not alone not brought home to him, but there is no testimony that any one on the "Irmgard" heard the warnings if any, rendering more probable the truth of the statement of Lorenzen that he did not hear them. But even if the warnings had been heard by Lorenzen and disregarded by him, thus showing a degree of negligence on his part, that would not have relieved the defendant from the results of its negligence, if any, if by the exercise of reasonable care it could have avoided the consequence of the libellant's negligence. (*Inland & Seaboard Coating Co. v. Tolson*, 139 U. S. 551, 558).

It is evident from the testimony of the witnesses for the defendant, and especially from that of Captain Petersen, that the transferring of the first load of sugar is a very dangerous operation from the fact that it is difficult to tell just where the sugar will land, or how the machinery is going to operate. If this be so then the utmost care should have been used in the handling of the apparatus. But was this done?

It is shown that all of the rope used in the handling of this sugar was new rope; and there is some proof that the rope stretched, Captain Petersen testifying that the forward guy stretched some five feet. There is other testimony that it probably stretched some two or three feet, which I am inclined to believe is nearer the truth. It is a matter of common knowledge that new rope will stretch. Petersen claimed to be an experienced mariner, and he should have known this fact and guarded against it. But it is directly in proof that no test was made of the ropes, before the work of transferring the sugar began.

But, admitting that the rope stretched five feet, it would only have changed the position of the sugar where it struck the deck of the "Irmgard" five feet; and if it had not stretched, the sugar would have landed about eight feet forward of the hatch, as it is beyond dispute the sugar struck Lorenzen some thirteen feet forward of the hatch, when it should have landed near, or somewhere near the edge of the hatch.

When this sling load of sugar containing 1250 pounds weight was hoisted out of the hold of the "Noeau", and suspended from the donkey fall, it appears that the strain was then transferred from the donkey fall to the burden line, and the burden man's duty was to lower away slowly to the deck of the "Irmgard", after the donkey man has swung out the load free of the deck of the "Noeau"; and in order to control his burden line, the burden man is supposed to take sufficient turns of the line around a post or "dolly head" so-called. In this instance, when the sling load was suspended on the burden line, the man at the "dolly head" wrapped the rope around three times, but was unable to control its fall.

Kalauhi, the burden line man, testified:

"When the sling first commenced to come down, I was ordered to hold on to the slack and as the sling of sugar came down it had such a weight I couldn't very well hold it; there was some slack going through my hands; I suppose that was the time the man was hurt because the sugar was too heavy."

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He further testified that the captain of the "Noeau" told him to "hold on"; that he held on "for a good while, a little while", but that the rope commenced to run again. "The weight of the sugar made it run."

He further testified, "that if he had more turns around the dolly head he could have stopped it; that would have fastened it altogether"; while Captain Petersen testified:

"He tried to hold on so that the sugar would remain in the air and not strike the deck, and he couldn't do it."

And Captain Petersen further testified:

"That at the first sling load the burden man took only three turns around the dolly head but he used four turns thereafter because he saw that he could not hold it with three."

This testimony was brought out upon the direct examination of this witness. It is clear that the kernel of this case is right here. Three turns were taken round the "dolly head" alone, and this man's injury was the result; after that four turns were taken and no more difficulty was experienced but the fall of the sling load of sugar was controlled. That the reason why the man at the burden line could not control or hold the sling of sugar was that he had not taken wraps enough around the "dolly head" seems to be clear. It was his duty to have seen this and remedied it, and it was the duty of the captain of the "Noeau" to have realized this and ordered the man at the burden line to take another wrap, and to see that it was done. Captain Petersen admitted that the burden line if held under control, while the sugar was being landed on the deck of the "Irmgard", would have doubtless placed it in its proper place, and inferentially avoided this accident. That is what the burden line is for, and that is what the burden man is for. And the fact that after the occurrence of the accident, it is in testimony that four wraps round the "dolly head" were taken, is a significant one.

It is true that the testimony of the officers and men of the "Noeau" was somewhat shadowy as to whether the sling load of sugar went down too fast or not. Captain Petersen evaded the direct question of the court on this point; but the weight of the evidence bears out the theory that the burden line man

lost all control over the fall of the sugar, and that it dropped by its own weight, possibly not so rapidly as was said by libellant "like a cannon ball", but certainly as fast as gravitation could carry it down.

That the injury to libellant was caused by the improper handling of the appliances and gear of the "Noeau" by the officers and crew thereof, who had exclusive control of the same in the transfer of this sugar is plain, after a consideration of all the evidence; and the fact of this exclusive control is an important element in this class of cases. *Miller v. Oceanic Steamship Co.*, of Savannah, 118 N. Y. 199, 208-9; *Cummings v. National Furnace Co.*, 60 Wisc. 603, 612; *The Robert Lewers*, Estee, J., decided Mar. 27, 1901; (1) *The Robert Lewers Company v. Kekauoha*, 114 Fed. Rep. 849. And especially is this so in view of the fact that the Court is unable to hold that there was contributory negligence on the part of the libellant.

Now as to the amount of damages. There is no question as to the injury to the libellant and he is entitled to some damages, not alone for the pain and suffering produced by the injury, but also for the possible length of time that he may be incapacitated from pursuing his calling of seaman.

It is in evidence that Lorenzen was acting as first officer of the "Irmgard", at a salary of sixty dollars per month when the accident occurred; that he was physically a sound, well man when he was injured; that he holds a certificate as first officer for sail and a certificate as second officer for steam. It seems reasonable to suppose that if this injury had not been inflicted, he would have been a sound man and able to pursue his calling uninterruptedly at a salary of at least sixty dollars per month for many years to come. Dr. Taylor, an expert called for the defendant, testified that in his judgment, while the injury was permanent, yet the body of libellant would adjust itself in time to the shortness of the injured leg, and that he thought "at the end of two years the leg will be as useful as it was before it was hurt." I am inclined to think that this is so, and being so that at the end of two years he will be able to resume his vocation of seaman, if not possibly before that time. I will therefore allow

libellant the sum of fourteen hundred and forty dollars, being the amount of wages at the rate of sixty dollars per month, which it is reasonable to assume he would have been able to earn in two years from the time of the injury, had he not been deprived of the ability to do so by this injury.

In addition thereto, libellant is entitled to something for the injury itself and the pain and suffering consequent thereon. The evidence shows, that the injury was a very grave one; in fact according to both the testimony of Dr. Humphris and Dr. Taylor, the injury is permanent, although the disability doubtless is not. That while the bones have knit, the joinder is not perfect, but is an overlapping one; that there is a curvature and the leg will continue to be from three quarters of an inch to an inch shorter than the other. In addition to the breaking of the leg, the libellant suffered grave bruises, the bruise on the shoulder being "excessively severe". He was confined to the Queen's Hospital for three months and some few days, suffering much pain; and it is in evidence that he still suffers pain and according to Dr. Humphris, there is a possibility that he will always suffer pain. It is difficult to measure pain in money. In most of the cases examined by the court, wherein injuries of a similar nature were sustained, the average damages assessed is about four thousand dollars, in full of everything. However, in the main, these cases show an injury if not greater at the outset, yet more severe in the permanent disabling effects than in the case at bar. I am therefore of opinion that in view of all the circumstances of this case, the sum of fifteen hundred dollars would be a fair compensation for the extra pain and suffering endured by libellant and will allow that amount in addition to the fourteen hundred and forty dollars already allowed, making a total of two thousand nine hundred and forty dollars, together with costs of suit."

Let judgment be entered in accordance herewith.

(1) See ante, *Kekauoha v. Schooner Robert Lewers Company*, page 75.

W. H. HOLLAND v. STEAMSHIP "HELENE", WILDER
STEAMSHIP COMPANY, intervenor.

DECIDED: JULY 26, 1902.

1. By the Act of February 18, 1895, Vol. 28, U. S. Stats. at Large, p. 667, the provisions of Section 4546, R. S. U. S., which exempt the wages due or accruing to any seaman "from attachment or arrestment in any court," are made applicable to all seamen engaged in the "coastwise trade" who ship before a United States Shipping Commissioner.
 2. In an action brought by the engineer of the steamship Helene, admitted to be a vessel engaged in the "coastwise trade," which action is based on Section 4546 of the R. S. U. S., and where it appeared that in an action before the District Magistrate of Honolulu, a judgment was rendered against libellant, and his wages in the hands of the Wilder Steamship Company had been garnished, which company had thereupon refused to pay libellant the same; and it being shown that libellant had signed before a Shipping Commissioner at San Francisco, when entering the service of the Wilder Steamship Company;
- Held*, that under the provisions of the Act of February 18, 1895, Vol. 28, U. S. Stats. at Large, p. 667, the wages of said libellant were exempt from garnishment, and the Wilder Steamship Company ordered to pay to the libellant the wages sued for.
3. The wages of libellant are further exempt from garnishment under the provisions of Section 8 of an Act of the Legislature of the Territory of Hawaii, entitled "An Act to provide for the exemption of certain personal property from attachment, execution, distress and forced sale of every description....." passed April 24, 1901; it being admitted that he is the head of a family, earning less than \$200 a month.

IN ADMIRALTY. PROCEEDING UNDER SECTION 4546 R. S. U. S.

T. I. Dillon, proctor for complainant.

Kinney, Ballou & McClanahan, proctors for intervenor.

ESTEE, J. This is a proceeding under Section 4546 of the Revised Statutes of the United States which provides as follows:

"Whenever the wages of any seaman are not paid within ten days after the time when the same ought to be paid according to the provisions of this Title, or any dispute arises between the

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master and seamen touching wages, the district judge for the judicial district where the vessel is, may summon the master of such vessel to appear before him to show cause why process should not issue against such vessel, her tackle, apparel, and furniture according to the course of admiralty courts, to answer for the wages."

The complainant in this case is the engineer of the steamship "Helene" belonging to the Wilder Steamship Company and plying between the Islands of the Hawaiian group.

The complainant as such engineer is in receipt of a monthly salary of sixty dollars; during his absence on one of his inter-island trips, on to-wit: the 28th day of June, 1902, one Yee En Kee, commenced an action at law against him before the Hon. Lyle A. Dickey, District Magistrate of Honolulu, for an alleged indebtedness claimed to be due from complainant to him in the sum of \$46.10; and in said action, a garnishment was issued against the Wilder Steamship Company, garnishing the wages of the plaintiff in its hands. There was due from the Wilder Steamship Company to the plaintiff on the first day of July, 1902, the sum of sixty dollars, which was one month's wages.

On the 7th day of July, 1902, a judgment was rendered against the Wilder Steamship Company as said garnishee in the sum of \$46.10 which said judgment still remains unpaid. The Wilder Steamship Company upon demand of plaintiff refused to pay him his wages for the month of June, when the same came due, considering itself bound not to do so under said garnishment proceedings.

Whereupon the plaintiff applied to this court within the statutory time, under the provisions of Section 4546 of the Revised Statutes above referred to, for an order to show cause directed to the captain of the said steamship, "Helene," why process should not issue, for the payment of said wages; said plaintiff further relying upon the provisions of Section 4536 of the Revised Statutes of the United States relative to the exemption of seamen's wages from attachment or arrestment by the order of any court. An order to show cause was issued out of this Court directed to the master of the said steamship "Helene," one

Donald F. Nicholson, and to said vessel, in accordance with the provisions of Section 4546 aforesaid.

Thereupon the Wilder Steamship Company filed an intervention in the said proceedings admitting all of the facts above stated, and alleging that the wages claimed to be due claimant were due from it, and setting up as a reason for its refusal to pay the same, the garnishment and judgment of the District Magistrate; but at the same time depositing with the clerk of this court the sum of sixty dollars, the amount of wages claimed to be due said libellant and submitting the whole question to the jurisdiction of this court.

It was further admitted that the complainant is the head of a family, earning wages less than \$200 a month. The facts appear to be admitted. The question resolves itself into one of law alone. Were libellant's wages subject to garnishment?

Whatever may have been the inferences to be drawn from those provisions of the early Act of Congress passed July 20, 1790, and known as an Act for the "government and regulation of seamen in the merchant service", and now embodied in Sections 4530, 4546 and 4547 of the Revised Statutes, as to the exemption of seamen's wages from garnishment or attachment, it is clear that there was no exact statutory expression upon this subject until the passage of the so-called Shipping Commissioner's Act on June 7, 1872, (Sections 4501-4612 R. S. U. S.); Section 4536 being the special provision made for this exemption in the following terms:

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law notwithstanding any previous sale or assignment of wages, or of any attachment, incumbrance or arrestment thereon"

The point was raised in this proceeding that the complainant was barred from the benefits of Section 4536 by an Act of Congress of June 7, 1874, wherein it was provided that none of the provisions of the Act relating to Shipping Commissioners "shall apply to sail or steam vessels in the coastwise trade, except the

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coastwise trade between the Atlantic and Pacific Coasts. ”

I do not deem it necessary to pass upon the question of what constitutes the coastwise trade of the United States, as it is admitted for the purposes of this case, and the questions involved that the steam vessels of the Wilder Steamship Company, including the steamship “Helene,” are American vessels engaged in the coastwise trade. It would seem from an examination of the Act of 1874, that the provisions of Section 4536 do not apply to sail or steam vessels engaged in the coastwise trade, although the decisions on this point are widely conflicting. In a very well considered and exhaustive opinion rendered by Judge Benedict, in the case of *McCarty v. The Steam Propeller City of New Bedford*, reported in 4th Fed. 818, in which he goes over the entire field concerning the question of sailors’ wages being exempt from execution, the learned judge takes the ground that the Act of Congress of 1874 was not intended to change the terms of Section 4536; that it had been the well established history of the admiralty to recognize this exemption of wages and that Section 4536 was simply declaratory of a long existing law, and that it was not reasonable to recognize a distinction as between one class of seaman and another class. While I am inclined to give my assent to the general reasoning of that opinion both on this point and on the other questions involved in that case, yet in view of the decision of the Supreme Court of the United States in the case of the *United States v. The Grace Lothrop*, (95 U. S. Page 527-532) holding that by the Act of 1874, Congress intended to declare that the original Act of 1872 should not apply to vessels engaged in the coastwise trade, other than the trade between the Atlantic and Pacific Coasts, and also in view of the later Acts of Congress amendatory of and supplementary to, the Shipping Commissioners’ Act, I am forced to the conclusion that the Act of 1874, standing alone, might defeat a proceeding of this character in the event the complainant was employed on a vessel engaged in the coastwise trade. However, there have been several important amendments to the Shipping Commissioners’ Act since the Act of 1874, which shed a different light upon it.

In order to understand these amendments it must be remembered that under the Act of 1872, shipping articles were to be made in writing or in print with every seaman before proceeding on the voyage, and where the voyage was to be a foreign one (other than one between the United States and the British North American possessions or the West Indies or the Republic of Mexico), or was to be from a port of the Atlantic to a port of the Pacific or *vice versa*, in a vessel of a burden of seventy-five tons or upward, these shipping articles must be signed in the presence of a shipping commissioner, unless there is no shipping commissioner at the port, in which event the collector of customs or his deputy may conduct the business of such commissioner (Section 4511 R. S.). While it was provided by Section 4513 R. S. U. S., that the terms of Section 4511 "shall not apply to.....masters of coastwise.....vessels."

In the Act of June 19, 1886 (Vol. 24, P. 79-80 U. S. Stats.) this law was amended in relation to the shipping of seamen for any vessel engaged in the coastwise trade or the trade between the United States and Canada, or Newfoundland, the West Indies and the Republic of Mexico, by permitting the shipping commissioners to "ship and discharge such crews at the request of the master or owner of the vessel....."

Again on August 19, 1890, (Vol. 26 P. 320 U. S. Stats.) it was further provided (contemplating the possibility of crews of vessels engaged in the coastwise trade other than foreign, as specified in the Act of 1886, being shipped before the shipping commissioner), that certain provisions of the Revised Statutes should be extended to such vessels.

And again in the Act of February 18, 1895 (Vol. 28, Page 667 U. S. Stats.) it is finally provided that—

"When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade.....such seamen shall be discharged and receive their wages as provided by the first clause of Section 4529 and also by Sections 4536.....of the Revised Statutes.....but in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into

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between the master of the vessel and a seaman without going before a shipping commissioner."

It seems to be clear that in addition to the extension of the other provisions of the Revised Statutes enumerated in said Act, it was the intention of Congress to remove the limitations arising through the Act of 1874, in relation to the exemptions of seamen's wages in the coastwise trade, from all seamen shipping on vessels engaged in that trade, who shipped before a shipping commissioner.

It is admitted that the contract signed by complainant when entering the service of the Wilder Steamship Company was so signed before a shipping commissioner at San Francisco.

Seamen's wages have been at all times guarded by the laws of all civilized countries, until, as was well said by Mr. Justice Ware, the protection of seamen's wages has become 'the common law of the sea.' And while a few cases are found in the books where attempts have been made as in this case, to garnishee the wages of sailors by inferior local law courts, yet so far as I can find in no single instance have the attempts succeeded.

It is indeed a part of international law to protect sailors' wages. This has been done as a matter of public policy. Their duties are fraught with danger, their home is upon the sea. They are mere children when upon land in all matters of business. So much is this recognized, that it has become the settled law that an express agreement on the part of a seaman to waive his lien for wages on the ship cannot be enforced.

"Admiralty courts will withhold their sanction from any such agreements, not only upon equitable considerations growing out of the improvidence and want of intelligence of seamen in their bargains, but also upon considerations of public policy." *The Sarah Jane B. & H.*, 414. *Taylor et al. v. Carryl*, 20 How. 503, 601. *McCarty v. Steam Propeller City of Bedford* & Federal, 818, 827.

While it appears that in this case a judgment was obtained against the Wilder's Steamship Company, intervenor herein, in the action before the District Magistrate of Honolulu, and which

judgment still remains unpaid, yet "Courts of law cannot undertake by garnishment to settle the equities between the parties in order to subject an equitable demand which the defendant may have against the garnishee to the payment of the defendant's debt." Drake on Attachments, 457. *Ross v. Bourne*, 14 Fed. 858-861, *Bourne v. Ross*, 17 Fed. 703.

As was said by Chief Justice Taney in his dissenting opinion in the case of *Taylor et al. v. Carryl*, 20 How. 601:

"The seamen as a matter of right, are entitled to process of the court to enforce payment promptly in order that they may not be left penniless and without means of support, and the right to this remedy is as well and firmly established as the right to a permanent lien. No court of common law can enforce or displace this lien. It has no jurisdiction over it nor any right to obstruct or interfere with the lien or the remedy which is given to the seamen.".....I do not understand these propositions to be disputed."

Furthermore, there is a territorial statute which exempts the wages of complainant from attachment, execution or distress. It is provided by Section 8 of "An Act to provide for the exemption of certain personal property from attachment, execution, distress and forced sale of every nature and description, passed by the legislature of the Territory of Hawaii on April 24, 1901, (1) that among said personal property so exempt, shall be "the wages of every laborer or person working for wages, such person being the head of a family, to the amount of \$200....." The complainant would come under this category.

It is therefore clear to the court that it is not only safe in cases of this character for all American merchant ships when reaching the port of destination to pay all sailor's wages then due, but that it is the ship's duty to do so and that the payment of the sailor under the forms of law is the settlement of the claim and thus relieves the ship.

It is ordered that claimant be paid by the Wilder Steamship Company, the sum of sixty dollars, his wages for the month of June, 1902, together with his costs of this proceeding.

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It is further ordered that the sixty dollars on deposit with the clerk of this court be used for that purpose so far as it will go, which sixty dollars together with said costs shall constitute the full amount due the libellant in this proceeding.

And that the wages of this libellant are exempt from garnishment, levy or attachment.

(1) See *Act 9, Page 11, Session Laws 1901.*

IN THE MATTER OF THE ESTATE OF S. W. LEDERER,
an involuntary bankrupt.

DECIDED: SEPTEMBER 2, 1902.

- 1 Under Section 11, Subdivision A, of the Bankruptcy Act of 1898, the United States District Court sitting as a court of bankruptcy, has full power, pending a hearing upon a petition in bankruptcy, to stay by summary process all proceedings in a territorial court affecting the property of the alleged bankrupt, where it appears that such proceedings are founded upon claims from which a discharge would be a release.
2. Pending the hearing upon a petition in an involuntary proceeding in bankruptcy, restraining orders will issue out of the bankruptcy court, directed to the Sheriff of the Territory, enjoining him from selling or disposing of the property of the alleged bankrupt levied upon by him under executions issued upon judgments obtained in the territorial courts within four months prior to the filing of the petition in bankruptcy.
3. On July 26, 1902, a petition was filed by certain creditors of an alleged bankrupt, to adjudicate him a bankrupt. The acts of bankruptcy complained of were preferences by legal proceedings to two creditors, who obtained judgments against said alleged bankrupt on the 20th day of June, 1902, in the District Court of the city of Honolulu, Territory of Hawaii. Executions issued on both judgments, and the property of the alleged bankrupt was levied upon by the Sheriff of the Territory of Hawaii, and the same was advertised for sale on the 28th day of June, 1902. Upon application of one of the petitioning creditors, two restraining orders were issued out of this court on July 28, 1902, the day of the sale, enjoining and restraining the said Sheriff from disposing of or selling any of the property levied upon until hearing was had upon the petition in bankruptcy. A motion to dissolve said restraining orders was made and denied, said orders being continued in force under the powers granted the bankruptcy courts by

Section 11, Subdivision A, and also by Section 2, Subdivision 15, of the Bankruptcy Act of 1898, giving the court "power to make such orders, issue such process and enter such judgments as may be necessary for the enforcement of the provisions of this Act."

IN BANKRUPTCY. MOTION TO DISSOLVE RESTRAINING ORDERS
DIRECTED TO SHERIFF OF HAWAII.

Holmes & Stanley, for petitioning creditors.

Thayer & Hemenway, for judgment creditors.

ESTEE, J. This is a motion to dissolve two certain restraining orders granted by this court in the matter of the above estate on the 28th day of July, 1902, whereby the Hawaiian Star Newspaper Association, Limited, a corporation, and Hoffschlaeger & Co., Limited, a corporation, their officers, servants, agents, etc., and Arthur M. Brown, High Sheriff of the Territory of Hawaii, were restrained and enjoined from selling, disposing of or in any way interfering with the property of S. W. Lederer until an adjudication upon the petition to adjudge him a bankrupt then pending before this court should be had.

On July 26, 1902, a petition to adjudge the said S. W. Lederer, a bankrupt, was filed by E. C. Winston (who afterwards applied for the restraining orders aforesaid) D. A. Hulse, and H. T. James, creditors of the said bankrupt; that the act of bankruptcy alleged to have been committed by the said Lederer was that within four months prior to the filing of the petition, and while he was insolvent, he permitted the Hawaiian Star Newspaper Association, Limited, to obtain a preference through legal proceedings by suffering and permitting the said Hawaiian Star Newspaper Association, Limited, to obtain a judgment against him on the 20th day of June, 1902, for the sum of \$113.90 in the second District Court of the city of Honolulu, upon which execution was issued and his property seized by the High Sheriff of Honolulu and advertised for sale on the 28th day of July, 1902.

On the said 26th day of July, 1902, and contemporaneous with the filing of said petition to adjudge said Lederer a bankrupt, the said E. C. Winston filed two certain petitions with the

court setting up first, the facts in relation to the aforesaid judgment of the Hawaiian Star Newspaper Association, Limited, and the levy upon the property of the said Lederer by the said sheriff, and also the further allegations that on the 18th day of June, 1902, Hoffschlaeger & Co., a creditor of the said Lederer, had commenced an action against the said Lederer in the Second District Court of Honolulu upon a claim of \$97.24; that the same was prosecuted to judgment and that on the 20th day of June, 1902, the said Lederer permitted a judgment of \$115.39 to be entered up against him in said court, and that upon said judgment execution had been issued to Arthur M. Brown, the Sheriff of the Territory of Hawaii, who had made a levy upon the property of the said Lederer under the said execution, and in both of the said cases had advertised the property for sale and intended to sell the same on the 28th day of July, 1902, which if he was permitted to do, would enable the Hawaiian Star Newspaper Association, Limited, and the said Hoffschlaeger & Co., Limited, to obtain a greater percentage of their respective debts than they were entitled to.

Upon considering the said petitions, the two restraining orders complained of were issued out of this court on the 28th day of July, 1902, directed to the said Hoffschlaeger & Co., Limited, and the said Hawaiian Star Newspaper Association, Limited, and to the said Arthur M. Brown, Sheriff as aforesaid, in each case, enjoining and restraining them, their officers, agents, servants, etc., from interfering with the property of the said S. W. Lederer until a hearing could be had upon the petition of the said E. C. Winston and others to have the said Lederer adjudged a bankrupt; and also ordering them to appear and show cause on the 20th day of August, 1902, why the said restraining orders should not be continued for the space of 12 months from the date of adjudication, upon the petition of the said E. C. Winston and others to have the said Lederer declared a bankrupt; or if the said Lederer shall be adjudged a bankrupt, and shall apply for a discharge, then until the question of such discharge shall be determined; also to show cause why the writ of injunction should not issue under the seal of this court.

Whereupon the motion to dissolve the restraining orders was made.

The real point upon which said motion is based is briefly this: that this court has not power by summary process to stay proceedings in a state court in which a suit is pending concerning the property of the alleged bankrupt, at the time of the filing of the petition in bankruptcy, and before adjudication is had thereon.

The object of the Bankruptcy Act of 1898 is to relieve a debtor of all his indebtedness save the debts set forth in Section 17 of the Act, such as taxes due to either the United States, or any state, county, district or municipality in which he resides, or judgments in actions for frauds, etc., etc., after he shall have turned over to the Bankruptcy Court all of his property to be converted into money and distributed among his creditors who have presented and had their claims approved. The single purpose of the Act is to provide a certain and rapid means for marshaling the bankrupt's estate, and the law will not allow any interference in the matter. It is not the policy of the statute upon a fair construction to allow preferences to either attaching or judgment creditors who sue the bankrupt within four months of the filing of the petition in bankruptcy.

Subdivision f. Section 67 of the Act provides that—

"All levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and it shall pass to the trustee as a part of the estate of the bankrupt."

In this case it is alleged in the petition praying that Lederer be adjudged a bankrupt, that the judgment obtained by the Hawaiian Star Newspaper Association, Limited, was so obtained within the four months prior to the filing of the said petition and while said Lederer was insolvent; while in the petitions praying for the restraining orders issued, it is shown that

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the judgment obtained by the Hawaiian Star Newspaper Association, Limited, and that of Hoffschlaeger & Co., Limited, were obtained within the prohibitory period of four months referred to in Section 67 f.

The Courts of Bankruptcy of the United States under the Act of 1898 are "the district courts of the United States in the several states, the Supreme Court of the District of Columbia, the district courts of the several territories, and the United States Courts in the Indian Territory and the District of Alaska." (Section 2).

And in addition to the enumerated powers set forth in said Section 2, they are granted the further power to "make such orders, issue such process and enter such judgments as may be necessary for the enforcement of the provisions of this Act." (Subdv. 15 Sec. 2).

Section 720 of the Revised Statutes of the United States provides that—

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It is provided by Section 11 Subdivision A. of the Bankruptcy Act, that—

"A suit which is founded upon a claim from which a discharge would be a release and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition;"

And further provides—

"That if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time, such person applies for a discharge, then until the question of such discharge is determined."

There is no contention in this case that the judgments obtained by the Hawaiian Star Newspaper Association, Limited, and Hoffschlaeger & Co., Limited, are not founded upon claims that

are dischargeable in bankruptcy; and they would therefore come within the provisions of Section 11 A. aforesaid.

The statute seems too clear to be misunderstood, and it is evidently the meaning and intent of the Bankruptcy Law that the bankruptcy courts shall have full and complete jurisdiction and power over the assets of the bankrupt wherever they may be; and while it is true, that these restraining orders were issued before the hearing upon the petition to declare Lederer a bankrupt, yet they simply act as a stay to prevent the property of the bankrupt levied upon under the judgments being sold and passing into the hands of strangers, until it can be determined whether the said Lederer is a bankrupt; and then the question of whether the judgments are void as having been obtained within the restricted period of four months may be passed upon. If Lederer is adjudged a bankrupt by this court, and it is apparent that these judgments were obtained within the statutory four months prior to the filing of the petition, the judgments are null and void. The adjudication will at once vacate the judgments, and whatever jurisdiction the territorial court had over the matter would cease.

In re Richards, 96 Fed. 935; *St. Cyr v. Daignault*, 103 Fed. 854; *In re Kenney* (C. C. A.) 105 Fed. 897; in which latter case restraining orders were issued under analogous circumstances.

In re Tune, 115 Fed. 906. See also *Lum Man Suk*, District Court of Hawaii, Sep. 20, 1901; (¹) *In re Paul Voeller*, U. S. District Court of Hawaii, Jan. 6, 1902, (²) where the matter is fully gone into.

It has been held that the power of the bankruptcy court to prohibit any proceedings in a state court by a creditor to enforce a lien upon the bankrupt's property is to be exercised summarily and does not require a formal suit. *In re Clark*, 9 Blatch. (U. S.) 372.

While the Supreme Court of the United States in the case of *Bank v. Sherman*, 101 U. S. 403, stated that the filing of a petition in bankruptcy is a caveat to all the world and in effect an attachment and an injunction.

It is not reasonable to suppose that where, as has been decided many times, an adjudication of a person as a bankrupt, will vacate and render null and void any judgment obtained against him while insolvent within four months prior to the filing of the petition in bankruptcy, that the power of this court is so limited that it cannot stay the proceedings of a state court or any officer thereof pending such determination.

As was said in the case of *In re Mallory*, 1 Sawyer, (U. S.) 88, 98, affirmed by Circuit Judge Field;

"Especially in involuntary cases (like the one at bar), there is therefore good reason for giving the court power to enjoin between the time of the filing of the creditors' petition and the return of the order to show cause, as there is in these cases no voluntary surrender of property and the title cannot vest in the assignee until after the adjudication."

The motion to dissolve the restraining orders is denied, the said orders to be continued in full force in accordance with the terms thereof.

- (1) See ante, *In re Lum Mam Suk*, P. 135.
 - (2) See ante, *In re Voeller*, P. 191.
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W. C. PEACOCK, *et als.*, v. W. H. WRIGHT, as Treasurer, and J. W. PRATT, as Assessor and Collector of the Division of Honolulu, Territory of Hawaii.

DECIDED: SEPTEMBER 8, 1902.

1. The Legislature of Hawaii has the general power to legislate upon all questions of taxation in relation to providing a local system of revenue to carry on the government of the Territory of Hawaii, the only limitation being that such legislation shall not be "inconsistent with the Constitution and laws of the United States, locally applicable," and where said Legislature has enacted a local Income Tax Law, the United States District Court will not interfere by injunction to restrain the collection of taxes assessed under said law, where complainants have an adequate remedy at law.
2. The Organic Act passed by Congress for the government of the Territory is the fundamental law of the Territory of Hawaii; and

by the provisions of that Act the legislative power of the Territory is extended to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, locally applicable."

3. A territorial legislature has all the powers of a State legislature, except as limited by the Organic Act of the Territory, the Constitution of the United States and the Acts of Congress, and these powers include the power to tax for local purposes, which is inherent in all governments.
4. The avoidance of a multiplicity of suits given as a ground of equitable jurisdiction, is not such a multiplicity of suits as is contemplated in equity, where it appears that no one of the complainants would be subjected in any event to more than one action, either to recover from him the amount of an assessment found due under a territorial income tax law, or to recover back any moneys paid by him under color of legal process.
5. Where a bill in equity was filed by a number of complainants in the United States District Court against the Assessor and Tax Collector of the Territory of Hawaii, praying for an injunction against the said Assessor and Tax Collector, enjoining and restraining him from collecting from the complainants, or any one of them, the assessments claimed to be due under an Act of the Legislature of the Territory of Hawaii, known as the Income Tax Law (Act 20 Session Laws 1901, page 31) on the ground that the said law is unconstitutional and void; and alleging a general and common interest in the subject matter of the action by the complainants, and that they join in the action in order to avoid a multiplicity of suits; upon a demurrer filed to said bill upon the ground that the same does not state such facts as to entitle the complainants to the relief prayed for, and that they and each of them have an adequate remedy at law, the demurrer was sustained and the case dismissed, the Court holding:-
(1) That no equitable jurisdiction was shown to exist in the court to entertain the bill; (2) that each of the complainants had a complete and adequate remedy at law in an action to recover from the Assessor and Tax Collector of the Territory of Hawaii any moneys that may be paid by them, or any of them, to said Tax Collector under the compulsion of legal process; (3) that the Legislature of the Territory of Hawaii was acting within the general powers conferred upon it by Congress in the enactment of the said Income Tax Law, and this Court will not entertain a bill to enjoin the collection of the tax.

IN EQUITY. APPLICATION FOR INJUNCTION. DEMURRER TO BILL.

Thomas Fitch, attorney for certain complainants.

J. J. Dunne, attorney for certain complainants.

SEPTEMBER, 1902.

Robertson & Wilder and *E. P. Dole*, Attorney General of the Territory of Hawaii, attorneys for defendants.

ESTEE, J. A bill in equity was filed in this Court by complainants, praying this Court to enjoin the respondents therein from collecting or attempting to collect from the complainants or any one of them any moneys whatever upon assessments under an Act of the Legislature of the Territory of Hawaii of 1901, known as the Income Tax Law; and also praying the further order of this Court that it declare the said so-called Income Tax Law unconstitutional and void.

Before the hearing a motion to amend the bill in equity was made and granted, whereby the name of W. H. Wright, as the Treasurer, was stricken from said bill as one of the defendants therein, and the name of S. Roth & Co. as one of the complainants. The bill as amended is therefore directed only to the defendant, J. W. Pratt, as the Assessor and Tax Collector of the Honolulu Division of the Territory of Hawaii.

The bill sets forth the fact that complainants are residents and doing business in Honolulu, Territory of Hawaii; that in the year 1901, the Legislature of the Territory of Hawaii enacted Act 20, Session Laws of 1901, P. 31, known as the Income Tax Law; that the said law was at the time of its enactment, and ever since has been, and now is, invalid, unconstitutional and void and in violation of the Constitution of the United States, and especially of the Fourteenth Amendment to said Constitution.

The bill further alleges that, notwithstanding the invalidity of the law, the Treasurer of the Territory approved a form of return of income tax, and that J. W. Pratt, as Assessor for the Division of Honolulu, required and compelled complainants, and each of them, to make and return to him, and that they did each make and return to him under compulsion, and to avoid the penalties prescribed in the Act, sworn statements of the income of the complainants, and each of them, for the year commencing July 1, 1901, and ending July 31, 1902.

That the gross income returned as aforesaid by the complainants, amounts to more than the sum of two million one hundred and forty-seven thousand dollars; that the net income returned as aforesaid, amounts to the sum of four hundred and two thousand, eight hundred and thirty-four dollars; that the income tax on the same amounts to the sum of eight thousand and fifty-six and 68-100 dollars, and that the said assessor and collector will, unless enjoined by the order of this court, collect from these complainants the said amount.

The complainants further allege that if they should pay the tax to the assessor under protest, and it should afterwards be determined that the said law is unconstitutional and void, they could not procure a return of the money so paid, for in the meantime, under the system of finances adopted in the territory, the money received from complainants would have been paid out to persons having demands on the treasury of Hawaii.

Certain other allegations are made as to the condition of the treasury of Hawaii, which do not seem material to the case, the bill finally stating that the complainants have no adequate remedy at law; that they have a common and general interest in the subject matter of the action and will be similarly affected by the result thereof, and in order to avoid a multiplicity of suits they join herein.

The demurrer filed on behalf of J. W. Pratt, as Assessor and Collector of the Division of Honolulu, Territory of Hawaii, is based upon two grounds, namely:

1. "That the complainants have not in and by their said bill made or stated such a case as entitles them, or any of them, to any relief from or against the defendant touching the matters contained therein; and

2. "That the complainants are not entitled to sustain said bill for the reason that they have a full, complete and adequate remedy at law."

The Income Tax Law was passed by the Legislature of the Territory of Hawaii on the 30th day of April, 1901, and provided for the levy of taxes for territorial and local purposes only. The ordinary tax laws of the territory evidently did not

produce sufficient revenue for the support of the local government, and therefore the Legislature passed the Act complained of, providing for the levy and collection of this tax upon incomes.

There is no question in this case as to the power of the Legislature of the Territory of Hawaii to pass general taxation laws. Under the Act of Congress entitled "An Act to provide a government for the Territory of Hawaii, passed by the 56th Congress of the United States of America, on the 27th day of April, 1900, and approved on the 30th day of April, 1900," and which, under its terms, took effect on June 14, 1900, it is provided (Section 55 thereof):

"That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

"Rightful subjects of legislation" are those subjects upon which legislatures have been in the practice of acting with the consent and approval of the people they represent. *Maynard v. Hill*, 125 U. S. 190, 204; *Cope v. Cope*, 137 U. S. 682; *State v. Tutty*, 41 Fed. 753, 758.

The power to tax is in its very nature inherent in all governments, and is, under our political system, vested in the various legislatures, and in Congress for certain national taxes, limited only by constitutional provisions. And it has been held by the Supreme Court of the United States that a territorial legislature has all the powers of a State legislature except as limited by its organic act, the Constitution of the United States and the Acts of Congress. See *Walker v. New Mexico & S. P. R. R. Co.*, 165 U. S. 593; *Board of Trustees of Vincennes University v. State of Indiana*, 14 How. (U. S.) 268; *Miners' Bank v. State of Iowa*, 12 How. (U. S.) 1; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539; *Swan v. Williams et al.*, 2 Mich. 427.

Therefore, taking into consideration these general principles, and the decisions of the Courts, and in addition thereto, the language of Section 55 of the Organic Act, which is the fundamental law of the territory, (*National Bank v. County of*

Yankton, 101 U. S. 129), there can be no question as to the general power of the Legislature of Hawaii to legislate upon all questions of taxation in relation to providing a local system of revenue to carry on the government of the territory of Hawaii; the only limitation being that such legislation shall not be "inconsistent with the Constitution and laws of the United States, locally applicable." The passage of the Act complained of was undoubtedly within such legislative power subject to the constitutional and congressional restrictions referred to.

This being clear it alone remains for me to consider whether this court sitting as a court of chancery has the power or jurisdiction to enjoin the collection of this territorial tax which was regularly levied under an act of the territorial legislature, while acting within its general powers granted by Congress. Can this be done even if such act is unconstitutional and void? I do not think it can. It certainly cannot be done if there is an adequate remedy at law; and it seems clear to the court that in this case there is a complete and adequate remedy at law.

One of the chief reasons given for equitable relief in this case is, the avoidance of a multiplicity of suits; that each of the complainants would be obliged in the event that he were to pay the tax under protest upon the ground that the same was illegal, to bring an action for the recovery of the sum so paid; or that in the event that each of the complainants refused to pay the taxes each would be subjected to a suit by the tax collector and assessor for the collection of the same, all of which might as it is claimed, be avoided by the determination of the question of the legality of the tax by a court of equity.

But is the multiplicity of suits that complainants claim may be avoided by this court taking action, such multiplicity as is contemplated in equity? No one of these complainants would be subjected to more than one suit, either upon a refusal to pay or a payment under protest and a consequent suit to recover. This principle is stated most succinctly and clearly in the case of *Dodd v. Hartford*, 25 Conn. 232, 238, a case in which a joint petition was filed to restrain the collection from several

complainants, of sewer assessments made upon their lands severally, and which were claimed to be illegal: the Court there saying:

"The multiplicity of suits which the petitioner seeks to avoid does not injuriously affect any one of the petitioners. No one of them has occasion to expect any such multiplicity of suits affecting himself. One suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties severally from that one suit, and to consolidate the apprehended litigation. In other words, to enforce a consolidation rule by means of the extraordinary powers of the courts of chancery. If the assessment were against one person, only, it is not claimed that he could transfer from a court of law to a court of equity the question of his liability. But how is the condition of any one of these petitioners the worse, because others are assessed for the same improvement?"

The court saying further: "It would undoubtedly be convenient to try the question relating to these warrants in one comprehensive law suit. But it does not seem to the court that the case presented by the bill is one of such irreparable injury or of inadequate relief at law as to warrant us in taking it away from the legal tribunals."

See also *Cooley on Taxation*, page 546.

In the case of *Arkansas Building and Loan Association v. Madden*, 175 U. S. 269, Mr. Chief Justice Fuller said:

"The rule is that the collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal; but it must appear that the party taxed has no adequate remedy by ordinary process of law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction."

Pittsburg & C. Railway v. Board of Public Works of W., Va., 172 U. S. 32; *Shelton v. Platt*, 139 U. S. 591; *Douc v. City of Chicago*, 11 Wall U. S. 108, 112.

And the Court saying further, in the said case of *Arkansas Building & Loan Association v. Madden*, *Supra*, that—

"On principle, the interference of the courts of the United States by injunction with the collection of state taxes. . . . can only be justified in a plain case not otherwise remediable."

And finally held in that case that "the bill of complaint did not set forth any facts tending to show that complainants could not escape the forfeiture by payment of the \$205 under protest and recover back the money so paid, if the law should be held void. We assume that the payment would, under the circumstances, be compulsory and not voluntary and no reason is perceived why the rule permitting recovery back would not apply."

In the case of *Dows v. City of Chicago*, Supra, one of the earliest cases in which this principle is enunciated, and which is followed by the later decisions, Judge Field said:

"The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection, or the body to whom the tax is paid. . . . If the tax was illegal, the plaintiff protesting against its enforcement, might have had his action after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection; nor would he have been compelled to resort to a multiplicity of suits to determine his rights."

The law seems to be clear that when a person by the compulsion of the color of legal process, pays moneys unlawfully demanded, or is deprived of his property by seizure, he may recover it back. *Elliott v. Swartout*, 10 Pet. (U. S.) 137; *Bend v. Hoyt*, 13 Pet. (U. S.) 263; *Philadelphia v. Collector*, 5 Wall (U. S.) 720, 731; *Swift Company v. United States*, 111 U. S. 22; *Arkansas Building and Loan Association v. Madden*, 175 U. S. 269.

Again: It is prescribed by Section 3224 of the Revised Statute of the United States that—

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

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"Any court" undoubtedly refers to any court of the United States and comprehends this court. And I assume that the words "restraining the assessment or collection of any tax" means any tax prescribed by the Congress of the United States. Indeed it was held in *State Railroad Tax Cases*, 92 U. S. 575, quoting from pages 613, pages 613, 614, that—

"Although this (referring to Section 3224) was intended to apply alone to taxes levied by the United States it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting taxes on which the government depends for its continued existence."

The court going on further to show that there must be some other equitable ground of relief before it will interfere by injunction with the assessment or collection of a tax and stating that it will require "a clear case for equitable relief before it will sustain an injunction against the collection of a tax which is part of the revenue of a state."

The reason why the courts have so uniformly refused to restrain the collection of taxes whether illegally assessed or not unless it be shown that the circumstances of each case brings it within some well known branch of equity jurisdiction, rests chiefly in the fact that such injunctions are attacks upon the other independent and co-ordinate branches of government, and such injunctions would if lightly issued, operate as a restraint upon all government.

In this case no fraud is alleged, nor is there any other equitable point called to the attention of the court save the avoidance of a multiplicity of suits, which does not seem to the court to be a fact.

Let the demurrer be sustained and the bill dismissed with costs assessed to complainants.

Note: Affirmed on appeal. See *Peacock v. Pratt*, etc., 121 Fed. 770.

IN THE MATTER OF THE APPLICATION OF OSAKI
MANKICHI
for a writ of *habeas corpus*.

DECIDED: SEPTEMBER 12, 1902.

1. Section 616 of the Penal Laws of the Republic of Hawaii, compiled in 1897, provides that "the necessary bills of indictment shall be prepared by a legal prosecuting officer and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." Section 1345 of the Civil Laws of the Republic of Hawaii, compiled in 1897, provides that "no jury for the trial of any case, civil or criminal, shall be less than twelve in number, but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve."

Under these two provisions of the laws of Hawaii, and after the passage of the Joint Resolution of Annexation of both Houses of Congress, dated July 7, 1898, prescribing that "The Hawaiian Islands and their dependencies.....are hereby annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof," a Japanese was indicted in the Hawaiian Islands without the intervention of a Grand Jury, tried for the crime of murder, and convicted by a verdict of nine jurors of the crime of manslaughter, and sentenced to imprisonment at hard labor for twenty years. Upon an application for a writ of *habeas corpus* made to the United States District Court for the District of Hawaii by the said Japanese, on the ground that he was in custody contrary to the provisions of the Constitution of the United States, *Held*: That the conviction of petitioner was illegal and void under the provisions of Articles V, VI and VII of the Constitution of the United States, which became the supreme law of the Islands immediately after the passage of the Joint Resolution of Annexation. The writ allowed and petitioner ordered discharged, the Court having jurisdiction to issue the writ when justice demands it, or when a person is in custody "in violation of the Constitution." (Sec. 753, R. S. U. S.)

2. Congress provided by a Joint Resolution of both Houses, dated July 7th, 1898, that the "municipal legislation of the Hawaiian Islands.....not contrary to the Constitution of the United States.....shall remain in force until the Congress of the United States shall otherwise determine." By this joint Resolu-

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tion, Congress in the plenary power conferred upon it, provided that all municipal legislation of the Republic of Hawaii contrary to the Constitution of the United States should be repealed, leaving in force all that was not in conflict with it. No language could be plainer.

3. No reservation was made in the Joint Resolution of Annexation of Articles V., VI. and VII. of the Amendments to the Constitution relating to indictments or trial by jury in common law or criminal cases. This showed that American sovereignty not only prevailed here, as elsewhere in the Territories of the United States, but that nothing could be done or permitted here contrary to the Constitution of the United States.
4. This annexation was not in a "transition or inchoate" state, but was complete, and the Constitution came with annexation and became, and ever since has been, the supreme law of this Territory.
5. The finding of a true bill by a Circuit Judge of the Territory, or in any other manner than by the indictment of a Grand Jury properly empowered to act in the premises, is in direct violation of the provisions of Article V of the Constitution of the United States, and any person found guilty of an infamous crime without such indictment by a Grand Jury is illegally convicted, and should be released on *habeas corpus*.

HABEAS CORPUS.

George A. Davis and F. M. Brooks, attorneys for petitioner.

John W. Cathcart, Assistant Attorney General, for respondent.

ESTEE, J. This is an application for a writ of *habeas corpus*, arising upon the petition of one Osaki Mankichi, a Japanese.

The evidence, oral and documentary, shows that on the 4th day of May, 1899, a presentment was filed against the petitioner by the then Circuit Judge of the First Circuit of the Territory of Hawaii, and without the intervention of a grand jury, charging him with the crime of murder; that afterwards, in the May term of that court, of the same year, he was tried on the said presentment and convicted of the crime of manslaughter in the first degree. The verdict was returned by nine out of the twelve jurors. On the 22nd day of May, 1899, he was by the said court sentenced to twenty years' imprisonment at hard labor.

Petitioner now seeks his discharge upon the ground that he is being illegally imprisoned because of the fact that he was not indicted by a grand jury, nor convicted by the unanimous verdict of a jury of twelve men, as is required by the Constitution of the United States, it being claimed that the Constitution of the United States was in force in these Islands during the period covered by the trial, conviction and sentence of petitioner, and that Articles V, VI and VII of the Amendments to the Constitution were thus violated.

(1). The first point made by the learned Assistant Attorney General for the Territory is that this court has no jurisdiction to act and determine upon the questions involved in this matter, because a writ of error should be sued out of the Supreme Court of the United States by the petitioner herein; that whatever may have been the action of the territorial courts, the United States court ought not to interfere; that this case is not one of sufficient gravity to call for the interposition of this court on *habeas corpus*.

This is a Federal question raised in a territory of the United States which is governed by Federal law under the Constitution of the United States. The authorities referred to by the Deputy Attorney General, as sustaining his position against this court's assuming jurisdiction in this proceeding are not in point. Not one of the decisions cited relate to this class of cases. This territory is under the control of Congress and is not an independent state with a constitution and local statutes governing the trial and conviction or acquittal of persons charged with crime. Where a state is a party, and where a constitutional question is involved, a writ of error should, save in exceptional cases, be sued out of the Supreme Court of the United States, because of the delicate nature of a conflict of state and national jurisdictions. Here there can be no such conflict. I have been unable to find any authorities of like import where a conviction is had in a territory. Territorial action alone is involved here. The courts which have considered this matter be-

fore are all territorial courts, the alleged conviction of petitioner occurring under territorial law.

It should be here said that the territorial situation in Hawaii is peculiar. We are by land and sea over five thousand miles from the capital of our country, and practically the judicial officers of this country are beyond the immediate range of all appellate judicial tribunals. So all judicial officers here should be especially interested in maintaining public law in this territory, and more particularly in maintaining the Constitution and Statutes of the United States applicable hereto.

In this *habeas corpus* matter there is a wide difference of opinion between the territorial judges. Both the Supreme and Circuit Courts differ from each other and the members of the Supreme Court differ among themselves and especially so upon the question of the relation which this territory bears to the Constitution and laws of the United States. For instance, the Supreme Court of this Territory held in the very recent case of *Honomu Sugar Co. v. Sayewiz* (12 Haw. 96), that certain Amendments of the Constitution of the United States were not in force here between the 7th day of July, 1898, and the 14th day of June, 1900, namely, Articles V, VII, VIII and XIII, which Articles relate to indictment by a grand jury for infamous crimes, to a common law jury trial, and to the existence of slavery in the United States. While the Supreme Court decided in the case of *Ex Parte Edwards* (13 Haw. 32) that no person could be put upon trial for an infamous crime in the Hawaiian Islands after August 12th, 1898 (the date of the raising of the American flag here) without having been first indicted by a grand jury, nor could he be convicted of such crime save by the unanimous verdict of a jury of twelve.

It was further held by the Supreme Court of the territory, on the 5th day of June, 1899, in the case of *Spencer v. Collector of Customs* (12 Haw. 66) that Hawaii could register vessels, although the territory was annexed to and formed a part of the United States.

This was practically overruled by the Attorney General of the

United States, who in a written opinion (22 Op. Atty. Gen. 578) instructed the Secretary of the Treasurer that:—

“With due respect to the judgment of the Supreme Court of Hawaii, I am unable to admit that an Hawaiian register can now be issued to a vessel, and the flag of Hawaii, the usual token of registration, be flown by her.”

From these decisions it is clear there is a wide divergence of opinion on the part of the Supreme Court of the territory, as to the constitutional question involved herein, and as to whether or not the people of this territory were during the period between July 7, 1898, and June 14th, 1900, living in an American territory and subject to such laws as were not inconsistent with the Joint Resolution of Annexation “nor contrary to the Constitution of the United States.”

The familiar rule of *stare decisis* does not seem to receive recognition by the Supreme Court of the territory, for that court decides one way at one time and another way at other times upon questions of the gravest importance and which cases involve identically the same principle. The very uncertainty of that court’s opinions tends to disturb and unsettle the public mind as to the national Constitution and its application to the people of and conditions in this territory, and is a strong inducement for this court to exercise its discretion in taking jurisdiction of this proceeding.

It is argued that the District and Circuit Courts of the United States are courts of original and limited jurisdiction, which is true; but the United States statutes make it the duty of United States District and Circuit judges to issue the writ of *habeas corpus* when justice demands it, or when “a person is in custody in violation of the Constitution.” (Section 753 Rev. Stats. U. S. 2nd Ed.)

“It is the duty of the courts to be watchful of the constitutional rights of the citizen.” *Boyd v. U. S.*, 116 U. S. 616. So constitutional provisions for the security of persons and property should be liberally construed. *Id.* 636.

As was said by the Supreme Court of the United States in

the case of *Walker v. S. P. R. R. Co.*, 165 U. S. 593, quoting from page 595-6:

"We deem it unnecessary to consider the contention of defendant in error that the territorial courts are not courts of the United States and that the Seventh Amendment is not operative in the territories, for by the Act of April 7, 1874, C. 80, 18 Stat. 27, Congress, legislating for all the territories, declared that no party shall be deprived of the right of trial by jury in cases cognizable at common law; and while this may not in terms extend all the provisions of the Seventh Amendment to the territories it does secure all the rights of trial by jury as they existed at common law."

If it be true that the Constitution and the Act of Congress referred to in *Walker v. S. P. R. R. Co.*, supra, has been nullified so far as this territory is concerned by the local territorial courts, then there should be an immediate remedy.

The learned Assistant Attorney General on the argument pressed upon the attention of the court the fact that on October 20th, 1900, this Court dismissed the petition for a writ of *habeas corpus* presented in the case of *In re Marshall*,⁽¹⁾ on the ground of lack of jurisdiction. But in that case the petitioner had been convicted of a misdemeanor and no Federal question was involved; the court then saying generally, that "only in very rare and extreme cases will it review upon *habeas corpus* the judgments or verdicts found in the highest territorial courts of the territory." And this court is still of the same opinion.

The question now presented is: Is this an exceptional case? I am compelled to believe that it is. Whatever the intention of the local territorial courts, their decisions upon this question are an attack upon the constitutional rights of the citizen affecting life and liberty, which are thereby made insecure. In view of all the circumstances, therefore, I think it would be in furtherance of public justice for me to exercise my discretion by assuming jurisdiction in this proceeding. I shall therefore consider the case under the writ.

The right of appeal in *habeas corpus* cases from the territorial circuit to the territorial Supreme Court, this court will not consider. This is a matter entirely within the province of the territorial courts.

So also as to the objections submitted in relation to Mr. Justice Perry sitting as one of the appellate judges in this case, originally tried by him while a circuit judge. That is largely a matter of discretion on his part, and I will not assume to question the wisdom of such discretion.

(2). Petitioner claims that he is in custody in violation of the Constitution of the United States in that he was tried and convicted of an infamous crime without an indictment by a grand jury, and by a verdict of less than twelve jurors, i. e., by nine of the twelve jurors. The specific Articles of the Constitution claimed to have been violated by such conviction are Articles V, VI and VII of the Amendments thereto.

There is no question as to the infamous character of the crime with which he was charged.

The Joint Resolution of both Houses of Congress annexing the Hawaiian Islands, passed by Congress July 7th, 1898, prescribes, among other things, that:—

"The Hawaiian Islands and their dependencies.....are hereby annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and all and singular the property and rights hereinbefore mentioned are vested in the United States of America."

After providing for the disposition of the revenues of the Islands and for the future enactment by Congress of special public land laws, the Resolution then prescribes:

".....The municipal legislation of the Hawaiian Islandsnot inconsistent with this Resolution, nor contrary to the Constitution of the United States.....shall remain in force until the Congress of the United States shall otherwise determine." (Vol. 30, U. S. Stats., 750.)

Municipal law is defined to be:

"The rule of law by which a particular district, community

or nation is governed." (1 Blackstone's Comm. 44; 1 Kent's Comm. 447; 2 Burrill's Law Dictionary, 215.)

The Resolution of Annexation of the Hawaiian Islands, as passed by Congress, prescribes that "they are annexed as a part of the territory of the United States" and are "subject to the sovereign dominion thereof," and on August 12th, 1898, the American flag was raised on the Islands. It matters not technically whether the Constitution followed the flag or followed American sovereignty here, for with American sovereignty came all of American law not especially reserved by the Joint Resolution of Annexation. It goes without saying that two sovereignties could not exist here at the same time, and when the Resolution of Annexation provided that "the municipal legislation of the Hawaiian Islands not inconsistent with this Joint Resolution nor contrary to the Constitution of the United States shall remain in force," it meant that all municipal legislative enactments of the Republic of Hawaii contrary thereto should be abrogated. No reservation was made in the Joint Resolution of Annexation of Articles V, VI and VII of the Amendments to the Constitution, relating to indictments or trial by jury, in common law or criminal cases. This showed that American sovereignty not only prevailed here, as elsewhere in the territories of the United States, but that nothing could be done or permitted here contrary to the Constitution of the United States. This annexation was not, as claimed by the Supreme Court of the territory in the case of *Peacock v. Republic of Hawaii* (12 Haw. 27-33), in a transition or inchoate state, but was complete, and the Constitution came with annexation, and became and ever since has been the supreme law of this territory. This is of paramount interest to the people of this territory, as it secures to all the equal protection of life, liberty and property, which are fundamental rights, and chief among which is the trial by jury.

It appears that the petitioner was indicted for the crime of murder under an indictment presented by the prosecuting officer of the territory and found by the Circuit Judge of the Cir-

cuit Court under the provisions of Section 616 of the Penal Laws (compiled in 1897) of the Republic of Hawaii, which reads as follows:

"The necessary bills of indictment shall be prepared by a legal prosecuting officer and be duly presented to the Presiding Judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not."

The petitioner was then tried upon the said indictment and a verdict of conviction of manslaughter was rendered by nine-out of twelve jurors who heard the case in accordance with Section 1345 of the Civil Laws (compiled in 1897) of the Republic of Hawaii, which prescribes as follows:

"No jury, for the trial of any case, civil or criminal, shall be less than twelve in number, but when nine of such jury shall agree upon a verdict, they may render the same and such verdict shall be as valid and binding upon the parties as if rendered by all twelve."

The questions then presented are:

Were the provisions of the Penal and Civil Laws of the Republic of Hawaii under which this petitioner was indicted, tried and convicted, "Municipal legislation contrary to the Constitution of the United States?" Or, in other words,

"Could a person in the Territory of Hawaii, between the 7th day of July, 1898, and the 14th day of June, 1900, when the Act for the government of the Territory of Hawaii went into effect, be legally tried for an infamous crime without having been first indicted by a grand jury, as required by Article V of the Amendments to the Constitution of the United States, or convicted by less than an unanimous verdict of twelve jurors, as provided by Articles VI and VII of said Amendment?

Article V of the Constitution of the United States reads in parts as follows:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Even if this constitutional provision had never been construed, the language is too plain for doubt.

It has been held by the Supreme Court of the United States that the Fifth and Sixth Amendments to the Constitution were not designed as limits upon the state governments in reference to their own citizens, but are only restrictions upon the Federal power. (*Barron v. Baltimore*, 7 Peters 243; *Thorington v. Montgomery*, 147 U. S. 490.)

The Hawaiian Islands were territory of the United States, "subject to the sovereignty thereof," and under the control of Congress when the original proceedings in this matter were heard before the Circuit Court of the territory.

Mr. Justice Bradley held in the case of the *Mormon Church v. United States*, 136 U. S. 1:

"That the power of Congress over the territories of the United States is general and plenary arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.....

"It would be absurd to hold that the United States had power to acquire territory and no power to govern it when acquired."

To the same point let me add it was recently decided in the case of *Downs v. Bidwell*, 182 U. S. 244, quoting with approval from the decision of Chief Justice Marshall in *McCullough v. Maryland*, 4 Wheaton, 316:

"That the power over the territories is vested in Congress without limitation, and this power has been considered the foundation upon which the territorial government rests."

As to territorial authorities on questions of the territories being subject to Federal provisions, see *Bradford v. Terry*, 1 Okl. 366; *Walker v. N. M. R. R. Co.*, 7 N. Mex. 282.

In the exercise of the plenary power conferred upon it, Congress provided by the Joint Resolution of Annexation that all municipal legislation of the Republic of Hawaii "contrary to the Constitution of the United States," should be repealed, leaving in force all that was not in conflict therewith. No lan-

guage could be plainer. I am constrained to hold that it was the intention of Congress to extend the Constitution, save as limited by the other provisions of the Joint Resolution, over these Islands and any other construction would be a straining after that which does not appear in the language of the Act.

As was said by the Supreme Court of the United States in the recent Insular cases (*Douglas v. Bidwell*, 182 U. S. 244, 271:)

"When the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith." And if Congress cannot control the constitutional rights of citizens after they have once been extended to them in the territories, how can the territories themselves do this through their courts or otherwise?

See *Thompson v. Utah*, 170, where the court, at page 349, says:

"Assuming that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is, whether the jury referred to in the original Constitution and in the Sixth Amendment thereto is a jury constituted as it was at common law of twelve persons, neither more nor less. . . . *This question must be answered in the affirmative.*"

Quoting approvingly from *Springville v. Thomas*, 166 U. S. 707, where the court says:

"In our opinion the Seventh Amendment secured unanimity in finding a verdict, as an essential feature of trial by jury in common law cases, and the Act of Congress could not impart the power to change the constitutional rule and could not be treated as attempting to do so."

And again on page 355 (*Thompson v. Utah*, supra), the court says:

"The Constitution of the United States gave the accused at the time of the commission of the offense, a right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."

See also *Webster v. Reid*, 11 How. 437, 460; *American Publishing Co. v. Fisher*, 166 U. S. 464, 468.

The finding of a true bill by a circuit judge of this territory, or in any other manner than by the indictment of a grand jury properly empowered to act in the premises, is in direct violation of the provisions of Article V. of the Amendments to the Constitution of the United States, and any person found guilty of an infamous crime without such indictment by a grand jury is illegally convicted and should be released on *habeas corpus*. (*Ex parte Bain*, 121 U. S. 1; *Ex parte Parks*, 93 U. S. 18, *Gallon v. Wilson*, 127 U. S. 540.)

It is fallacious to attempt to limit the force of the Constitution in this territory, or in view of the clear intent of the Resolution of Annexation, to curtail the constitutional rights of the citizen. The pointing out to the people, as the Supreme Court of the territory has done, that the Constitution "is not here in all its fullness," without stating what parts are and what parts are not here, simply befogs the question; and the argument of the Assistant Attorney General of the territory that trial by jury is not one of the fundamental propositions of the Constitution is contrary to the settled opinions of such illustrious American jurists as Marshall, Story and Kent, and also of the leading American statesmen who assisted in framing those Amendments to the Constitution.

The history of the trial by jury is the history of English and American civilization. It has come down to us from Magna Charta, and in criminal cases every presumption is in favor of sustaining it.

I am of the opinion that the proceedings in the Territorial Courts of Hawaii for the indictment and conviction of the petitioner herein were contrary to law and void, and that he is entitled to be discharged on *habeas corpus*.

Let the prisoner be discharged.

(1) *Ante*, P. 34.

Note: Reversed on appeal by U. S. Sup. Court, June 1, 1903.
Not yet reported.

UNITED STATES OF AMERICA *v* JEAN SABATE.

DECIDED: OCTOBER 18TH, 1902.

1. Policy of Government of United States to protect all people therein from illegal or improper handling of the mails.
2. A letter carrier is bound to deliver letters or mail in the condition in which he received the same, without any delay or detention, save that necessarily incident to his employment.
3. Circumstantial evidence; crime rarely committed in presence of witnesses.

CRIMINAL LAW. INDICTMENT UNDER SECTION 3891 R. S. U. S.
VIOLATION U. S. POSTAL LAWS.

Robert W. Breckons, United States District Attorney, for government.

Correa & Creighton and *J. M. Viras*, for defendant.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the jury: The indictment in this case upon which the defendant is held to answer, contains eleven counts, to-wit:

1. That the defendant did on the second day of December, 1902, in the District of Hawaii, while employed as a letter carrier in the postoffice of the United States, in the Territory and District of Hawaii, unlawfully detain, delay and open a certain letter, which was intended to be conveyed by mail, and which came into his possession as letter carrier aforesaid, and entrusted to him for delivery to the person to whom the same was addressed, to-wit: one Mrs. Frank Elwood Blake, at Honolulu, in the District and Territory of Hawaii.

2. The second count alleges the same procedure at the same place and on the same day, in relation to a letter addressed to Miss Pinao Brickwood, at Honolulu, in the District and Territory aforesaid.

3. The third count alleges the same procedure at the same place and on the same day, in relation to a letter addressed to

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Mrs. D. H. Chase, at Honolulu, in the District and Territory aforesaid.

4. The fourth count alleges the same procedure on the part of the defendant, at the same place and on the same day, in relation to a letter addressed to Mrs. Congdon, at Honolulu, in the District and Territory aforesaid.

5. The fifth count alleges the same procedure on the part of defendant, at the same place and on the same day, in relation to a letter addressed to Miss A. M. Felker, in the District and Territory of Hawaii.

6. The sixth count alleges the same procedure on the part of defendant, at the same place and on the same day, in relation to a letter addressed to Mrs. J. E. Gurney, at Honolulu, in the District and Territory aforesaid.

7. The seventh count alleges the same procedure, at the same place on the part of the defendant, but of the date of the fifteenth of October, 1901, in relation to a letter addressed to Mr. and Mrs. John Usborne, at Honolulu, in the District and Territory aforesaid.

8. The eighth count alleges the same procedure on the part of the defendant, at the same place, and of date the second day of December, 1901, in relation to a letter addressed to Mrs. E. L. Cutting, at Honolulu, in the District and Territory aforesaid.

9. The ninth count alleges the same procedure on the part of the defendant, and at the same place, but of date the twenty-fourth day of November, 1901, in relation to a letter addressed to Foster A. Davis, at Honolulu, in the District and Territory aforesaid.

10. The tenth count alleges the same procedure, at the same place, on the part of the defendant, but of date the thirtieth day of November, 1901, in relation to a letter addressed to J. W. Jones, at Honolulu, in the District and Territory aforesaid.

11. The eleventh count alleges the same procedure on the part of the defendant and at the same place, but of date the second day of December, 1902, in relation to a letter addressed

to C. A. Howard, at Honolulu, in the District and Territory of Hawaii.

It is provided by Section 3891 of the Revised Statutes in part, that—

"Any person employed in the department of the Postal Service, who shall unlawfully detain, delay or open any letter.... entrusted to him or which has come into his possession and which was intended to be conveyed by mail, or carried and delivered by any mail carrier.....letter carrier or other person employed in any department of the Postal Service.....shall be punishable by a fine of not more than five hundred dollars or by imprisonment for not more than one year or by both."

It is undisputed that the defendant at the time of the alleged commission of the offenses charged in the various counts of the indictment against him, was a letter carrier in the employ of the Postal Service of the United States, at the city of Honolulu, District of Hawaii. It is the policy of the government of the United States to protect all the people therein from any improper or illegal handling of the mails. The office of a letter carrier, while it may be an inferior one in the Postal Service, as compared with some other offices of that department, is yet of the gravest importance to the people in the district where the incumbents of such office receive the mail for delivery to whom it may be addressed. Under the employment of the defendant as such letter carrier, the defendant was bound to faithfully deliver to the persons to whom it was addressed all mail matter, including letters, which were entrusted to him or which had come into his possession for delivery as such letter carrier; and he was bound to deliver such letters or mail matter in the condition in which he received the same. In other words, such letters were to be delivered intact and without any delay or detention save that necessarily incident to his employment.

You are, therefore, in considering the evidence produced in this case to bear in mind three things:

Did the defendant unlawfully detain any one or all of the letters referred to in the counts set up in the indictment against

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him? Did he unlawfully delay the same or any one thereof? Did he unlawfully open any or all of the said letters?

If you should believe from the evidence, beyond a reasonable doubt, that the defendant did either unlawfully either detain or delay or open any one or all of the letters referred to in the said indictment, it will be your duty to find him guilty as charged. But you must go through each count, considering the evidence in relation to the charge therein, and finding the defendant guilty or not guilty as to you may appear from the facts as presented to you, of which facts you are the sole judges. The law you will take from the court.

You are to remember that under the law, innocence is presumed until guilt is proven. In considering the evidence, therefore, you are to give the defendant the benefit of all reasonable doubt. And by a reasonable doubt, gentlemen, is meant that after an entire comparison and consideration of all the evidence in the case, your minds are left in that condition in which you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof in this class of cases is on the government. But in arriving at a verdict in this case, you are not to be controlled by the number of the witnesses who may have testified on one side or the other, but rather by the conviction which the testimony may convey to your minds of the truth or falsity of the charge, whether such testimony be given by one or many witnesses. Of necessity the facts in this case, as in most criminal cases, are largely circumstantial, but you must bear in mind that crime is rarely committed in the presence of witnesses.

In rendering a verdict in this case, it will require the unanimous assent of all your members.

And in finding a verdict in this case you must find the defendant guilty or not guilty, upon each and every one of the counts of the indictment; proper forms of verdict will be given you to take to your jury room.

EDWARD CAMPBELL *v.* H. HACKFELD & CO., LTD.,
a corporation.

DECIDED: OCTOBER 21, 1902.

1. Where the jurisdiction of the United States District Court in admiralty was invoked in an action for damages on the ground that the injuries were sustained on board a vessel lying in the port of Honolulu by a stevedore in unloading a cargo from said vessel; and where it appeared from the allegations of the libel that the injury was the result of the negligence of a fellow stevedore, and damages are claimed against the defendant, who was engaged with its own employes alone in unloading the ship; the said libel in express terms alleging "that the persons who were engaged in the unloading of the said bark 'Aeolus' were all employes of the said defendant, and not members of the crew or employes of the said bark 'Aeolus,' and not fellow-servants of any capacity with any of the employes of the said bark 'Aeolus'"—on an exception filed to said libel on the ground that the relation between the parties to the action is such that admiralty has no jurisdiction over the subject, *Held:* When a tort of the character set up in the libel results directly from the conduct of a fellow stevedore, and the ship and its officers and men are distinctly exonerated from any blame in the matter by the allegations of the libel, and the libellant being so injured by a fellow stevedore while carrying out a contract of hiring with a "boss" stevedore, the mere fact that a ship may be incidentally connected with the tort would not make the latter a maritime one, or bring it within the admiralty jurisdiction of this court.
2. Jurisdiction in a case like the one at bar does not depend alone upon the locality where the injury was inflicted, but rather upon all of the facts of the case, including the locality. That is to say, it must occur upon the vessel on the high seas or in the tide-waters, and arise out of some privity between the injured man and the officers or owners of the ship. No such condition is shown to exist by the libel in this case. The exception is therefore sustained and the libel dismissed.

IN ADMIRALTY. EXCEPTIONS TO LIBEL.

Philip Farley, proctor for libellant.

Kinney, Ballou & McClanahan, proctors for libellee.

ESTEE, J. Exception is taken to the jurisdiction of the court in this case upon the facts as shown by the libel filed by the plaintiff herein.

Practically the facts appearing upon the face of the libel are as follows:

That the plaintiff was a stevedore; that the defendant was a corporation organized under the law, and is engaged in loading and unloading vessels and ships of all kinds, among them that certain Norwegian bark, the "Aeolus." That on the 26th day of July, 1902, or thereabouts, the plaintiff as such stevedore, was engaged to help unload the said bark by the said defendant. The said bark was then lying in the port and harbor of Honolulu in this district, in navigable waters of the United States; that while so engaged in unloading said bark, "Aeolus," and while on board of said vessel, to-wit: in the hold thereof, the plaintiff received the injury complained of in said libel. That this injury was caused by the carelessness and negligence of the defendant and its employes. The plaintiff especially exonerates the ship and its master and crew by alleging the following:

"That the persons who were engaged in the unloading of the said bark, 'Aeolus,' were all employes of the said defendant, and not members of the crew, or employes of the said bark, 'Aeolus,' and not fellow servants of any capacity with any of the employes of the said bark, 'Aeolus.' "

To this libel, exception is taken to the jurisdiction of the court on two grounds:

1. That the relation between the parties to the action is such that admiralty has no jurisdiction over the subject matter of the cause, for the reason that the parties to the tort are not within the admiralty jurisdiction of the court.

2. That the final consummation of the tort took place without the jurisdiction of this court, upon dry land.

For the purpose of deciding this exception or demurrer, I do not deem it necessary to consider the second point relied upon by counsel, as the facts composing the tort complained of in this case (as shown on the face of the libel) are not such as

would bring them within the rule of law relied upon by counsel in that point.

As to the first point made by counsel, I am inclined to think it is well taken. It is true I have been unable to find, after careful search, any case of a similar nature, nor has counsel called my attention to any such case. That is, where the action of the stevedore injured has been brought against a so-called "boss" stevedore, with whom he contracted. The books are full of cases in the admiralty courts, of actions for torts of a nature somewhat akin to the one at bar, but where the injury claimed is the result of the alleged fault of the officers or owners of the ship, and the officers or owners of the ship, or the ship itself are sued or where the party injured and claiming relief is a member of the crew. In all of such cases, the jurisdiction was necessarily sustained, or rather unquestioned.

It is true that the case of *Herman v. Port Blakely Mill Co.*, reported in 69 Fed. Rep 646, would seem to be somewhat opposed to this point of view. But that was a case of a suit against a mill company for an injury occurring on board a vessel, the plaintiff being an officer of the vessel and injured while acting with the other members of the crew in loading lumber into its hold. And in that case, while jurisdictional questions were raised and decided in favor of libellant, yet the vital question raised in this case was not one of them. There the question turned upon whether the injury originated on the vessel or on land, a point in this case that I consider of no importance, from the point of view of the facts alleged on the face of the bill. And again in that case it appeared affirmatively, that defendant caused the accident by sending lumber down the chute into the hold of the vessel, without giving the proper warnings, the parties stowing the lumber away, including the party injured, being the officers and crew of the vessel. In this case there was no privity of contract between this libellant and any officer or owner of the vessel. The injury is expressly stated to have been done by a fellow stevedore.

When a tort of the character set up in the libel herein results directly from the conduct of a fellow stevedore, and the

ship and its officers and men are distinctly exonerated from any blame in the matter by the allegations of the libel, and the libellant being so injured by a fellow stevedore while carrying out a contract of hiring with a "boss" stevedore, it does not seem to me that the mere fact that a ship may be incidentally connected with the tort would make the latter a maritime one, and bring it within the admiralty jurisdiction.

It is true, the broad rule is laid down in the admiralty text books, that in torts, the test of the jurisdiction is the location; yet, as I have before stated, I have been unable to find an adjudication upon the exact question raised here, a somewhat negative authority, it is true, but Benedict in his work on Admiralty (third edition) Section 308, recognizes the possibility of such cases and questions the jurisdiction of the admiralty courts therein, using the following language:

"It may, however, be doubted whether the civil jurisdiction in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which the admiralty jurisdiction in cases of contract applies."

I am, therefore, of opinion that the question of jurisdiction in a case like the one at bar does not depend alone upon the locality where the injury was inflicted, but rather upon all the facts of the case, including the locality; that is to say, it must occur upon the vessel on the high seas or in the tide waters and arise out of some privity between the party injured and the officers or owners of the ship. No such condition is shown to exist by the libel in this case. The exception is therefore sustained. Let the libel be dismissed without prejudice.

UNITED STATES OF AMERICA *v.* TANBARA GISABURO.

DATED: OCTOBER 25, 1902.

1. Jurisdiction of U. S. District Court of Hawaii established where alleged crime shown to have been committed on the high seas on vessel registered under United States laws and owned by an American corporation; and that the port of Honolulu was the first place to which vessel came after the commission of the alleged crime.
2. Presumption of innocence; reasonable doubt.
3. Common law definition of murder.
4. Malice; period of time during which may exist; difference between express and implied malice.
5. Manslaughter; defined by Section 5341, R. S. U. S.
6. Distinction between murder and manslaughter.
7. Race prejudice not to be entertained.
8. Duty of master of vessel to maintain order; duty of crew to obey orders.
9. Blow with fist no excuse in law for retaliatory use of knife.
10. A butcher knife a deadly weapon in contemplation of law.

CRIMINAL LAW. INDICTMENT FOR MURDER ON HIGH SEAS
UNDER SECTION 5339 R. S. U. S.

Robert W. Breckons, U. S. District Attorney, for government.

Frank E. Thompson, for defendant.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the jury: The prisoner at the bar stands accused of the crime of murder. The indictment is based upon Section 5339 of the Revised Statutes of the United States, and charges that the defendant on the 30th day of July, in the present year, in and on board of the American vessel, "Fred J. Wood," upon the high seas, did unlawfully, maliciously, wilfully and with malice aforethought, make an assault upon one Jorgen J. Jacobson, and by means of a knife, inflicted upon

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the said Jorgen J. Jacobson certain mortal wounds, from which mortal wounds the said Jorgen J. Jacobson did then and there instantly die.

By the terms of the indictment, it is charged that the defendant committed the crime of murder on board a vessel belonging in whole or in part to a citizen or citizens of the United States. To sustain the allegation in this case, the government has introduced evidence showing that the "Fred J. Wood" is a vessel registered under the laws of the United States of America and that she belonged in part to the E. K. Wood Lumber Company, and that the E. K. Wood Lumber Company is a corporation organized and existing under and by virtue of the laws of the state of California; that the port of Honolulu, in the District and Territory of Hawaii, is the first place to which said vessel came after the commission of the alleged crime. If satisfied of these facts beyond a reasonable doubt, and there appears to be no contradiction of such facts, then you are instructed that the jurisdiction of this court to try said offense has been fully established and made out; and that no further inquiry by you into this question of jurisdiction is necessary.

The prisoner has pleaded not guilty to the charge; and he comes to the bar of this court under the protection of that maxim of the law which holds that every man is presumed to be innocent until his guilt is proven. In a word, the burden of proof in this case is on the United States to establish the guilt of the defendant.

Gentlemen of the jury, you are to be the sole judges of the facts in this case. The law you will take from the Court. And you are to weigh the facts as shown upon the trial within the lines of the law as laid down in this charge.

Before you shall arrive at a verdict in this case, it must be by the unanimous assent of all your members. And you must be convinced beyond a reasonable doubt of the guilt or innocence of the defendant. The law, as I have said to you, presumes a man to be innocent until he is proven guilty. This presumption stands by him throughout the trial, and it will be necessary for the government to establish every material fact

in the case tending to show the guilt of the defendant beyond a reasonable doubt.

By a reasonable doubt, gentlemen, is meant a doubt based on reason and which is reasonable in view of all the evidence. It is not a fanciful or conjectural doubt, but must import such a condition of mind, after an impartial consideration of all the evidence, that you can not say you feel a conviction to a moral certainty of the defendant's guilt as charged.

Under the Act of Congress upon which the indictment was returned, it is provided that the punishment for the crime of murder shall be death. By a later Act of Congress, found in the second supplement to the Revised Statutes, Page 538, it is, however, provided that it shall be within the discretion of the jury in case it should return a verdict of murder against the defendant, to qualify such verdict by adding thereto the words "without capital punishment."

There is nothing in the Act of Congress under which the prisoner at the bar is being tried, which defines the nature of the crime of murder or which designates any degrees of which it may consist, such as murder in the first degree or murder in the second degree. In the absence of any such statutory provision the Federal Courts are obliged to have recourse to the common law and to the decisions of the courts thereon, for the definition or construction of the term of murder. The Act under which the prisoner is being prosecuted, simply provides that any person who commits murder "upon the high seas or any arm of the sea, or in any river, haven, lake, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of a state, shall suffer death."

Upon a resort, therefore, to the common law and the interpretation of the courts for enlightenment, we find that murder is defined to be the "unlawful killing by a person of sound memory and discretion, of any human being in the peace of the commonwealth, with malice aforethought, express or implied." ,

In considering the question whether the defendant in this case is guilty of the crime of murder, it will be necessary

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for you to have some understanding, gentlemen, of the legal meaning of the terms "Malice aforethought, express or implied."

I therefore instruct you, gentlemen of the jury, that malice aforethought is the especial characteristic which distinguishes the crime of murder from other cases of killing a human being. It need not necessarily be a special animosity or revenge or spite against the person killed in particular, but it may be a general evil intention. And this evil intention may be in law, either express or implied. Express malice is where one with a deliberate intent and design kills another; this design being evidenced by external circumstances which show an inward intention, such as antecedent threats, menaces or grudges or a lying in wait to do a person bodily harm.

But in many cases where malice is not expressed, the law will imply it. If one man kills another suddenly, without special provocation, the law implies malice. And there is no particular period of time during which it is necessary for malice to exist prior to the killing. If, without provocation that endangers life, an intent to do another person great bodily harm or to kill him is carried out the instant the desire springs into the mind, and the death of that person is the result, the offense is as certainly murder as if the intent had been fostered for a long period of time in the mind, awaiting a fitting opportunity to be executed. It may exist but for the moment sufficient to consummate the design; no limit can be placed on its duration. Crime is the result of mental processes which it is impossible for one other than the person accused of the crime to explain.

The difference, then, between express and implied malice is this: the one is indicated by the circumstances showing pre-meditation, the other is an inference of law to be drawn from the act committed. Malice is inferred when one person kills another person without great provocation.

The District Attorney has informed you in his opening statement of the case, that you were at liberty to bring in one of four verdicts, to wit: a verdict of not guilty; a verdict of guilty

of murder; a verdict of guilty of murder without capital punishment, and a verdict of manslaughter.

I hope I have made clear to you what constitutes murder, and I think you understand that murder implies the presence of malice, expressed or implied.

I cannot better explain to you the term of manslaughter than to read to you Section 5341 of the Revised Statutes of the United States, which provides that—

"Every person who, within any of the places designated in Section 5339 of the Revised Statutes (being within any fort, or arsenal, dockyard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States, or upon the high seas or any waters within the admiralty jurisdiction of the United States) unlawfully and wilfully, but without malice, strikes, stabs, wounds or shoots at or otherwise injures another, of which striking, stabbing, wounding, shooting or other injury, such other person dies, is guilty of manslaughter."

The distinction, therefore, between the crime of murder and that of manslaughter, as you will perceive, is the presence or absence of malice.

I may say to you, in the language of a celebrated judge, that:

"No words of reproach, how grievous soever, will excuse a man for killing another; nor will any trivial provocation, which in point of law amounts to an assault, not even a blow, of course reduce the crime of the party killing to manslaughter. For where the punishment inflicted for a slight provocation of any sort is outrageous in its nature, either in the manner or the continuance, beyond all proportion to the offense, it is rather to be considered as the effect of brutal malignity than of human frailty. It is one of the true symptoms of what the law denominates malice, and, therefore, the crime will amount to murder, notwithstanding such provocation. Barbarity will often make malice. This is the language of the most approved authority. For in cases of this sort, much also depends upon the weapons or manner of chastisement; for if it be one which immediately endangers life—(as such a knife as is described by the

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witnesses in this case) and it is used with brutal violence upon a slight injury, to produce death, the party will be guilty of murder. But if, from all the circumstances, the act may fairly be attributed to an intention not to kill or dangerously to wound, but to chastise or repel the aggressor, and therefore has not proceeded from a cruel and implacable malice, founded on a spirit of revenge, it will amount to manslaughter."

Gentlemen of the jury, I instruct you that it is within my province to comment upon the testimony, leaving, of course, the ultimate decision thereon to the jury. But you are intelligent men. You have sat here for almost a week, and I am sure are sensible of the high responsibility which rests upon you in the public duty you are now performing as members of this jury. The facts seem to me to be contained within a very small compass, and I shall not, therefore, review any of the testimony. I wish, however, to say to you, gentlemen of the jury, that you have taken an oath to give to the defendant a fair and impartial trial, and so you are not to be prejudiced against the defendant by reason of the fact that he belongs to another race than that to which you belong. He has testified in his own behalf, being at liberty to refuse to do so if he so desired; and you are to weigh his testimony just as you would weigh the testimony of any other witness testifying under like circumstances, whatever his nationality.

You are further instructed that in passing upon the evidence in this case, you must endeavor to reconcile the testimony of the various witnesses with the belief that they have tried to tell the truth. There may be some contradiction in the statements of the witnesses as to the exact time or manner of the commission of the crime charged in this case; such as the opinion of one witness that the defendant had the knife described in the testimony in his right hand, and that of another witness that he had the knife in his left hand. If you believe from the evidence that the prisoner did have the knife that killed Captain Jacobson in one of his hands, you should remember that it is the settled experience of human nature that in moments of excitement men rarely see all of the details of a matter from

the same point of view, or agree upon the exact details of an occurrence.

Gentlemen of the jury, I wish in conclusion, however, to call your attention to the fact that the defendant, although the cabin boy of the ship "Fred J. Wood," was twenty-one years of age, and a man full grown. It was his duty to obey the orders of the captain to the same extent as it was the duty of the sailors to do so. It was the duty of the captain to maintain order among his crew and to see to it that his orders were obeyed. The safety of the ship depended on this.

There is some testimony tending to show that when the captain ordered the defendant aft, he undertook to make him go, the boy proving sullen, and struck the defendant. You are the sole judges of the truth of this testimony. But in any event the court instructs you, that if the captain did so strike the defendant, he, the defendant, did not derive therefrom any right to stab the captain with a butcher knife, or to stab him in any manner, and that the action of the captain in so striking the boy, if you believe that he did strike him, was no excuse whatever in law for the use of the knife by defendant.

It must be remembered that the ship was far out at sea and that the use of a deadly weapon on ship board by any one of the crew or any officer upon anybody on board the vessel was and is illegal, except only in defense of life.

A butcher knife in contemplation of law is a deadly weapon.

I may repeat, gentlemen, that you are the exclusive judges of the facts in this case.

UNITED STATES OF AMERICA *v.* H. HACKFELD & COMPANY, LTD., a corporation.

(2 Cases.)

DATED: OCTOBER 28, 1902.

1. The custody of immigrants after examination by proper inspection officers and decision adverse to their landing is in the steamship company or its agent bringing such immigrants into the country.

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2. It is the duty of the steamship company or its agent, after notification of the rejection of any immigrant, to deport such immigrant to the country from whence he came.
3. If, after rejection by the proper immigration officers and pending deportation, an immigrant escapes into the country, the steamship company or its agent is liable under the law.
4. Due care on the part of the steamship company or its agent to prevent escape of immigrants is no excuse under the law and cannot be proven.
5. Nothing will excuse steamship company or its agent for escape of rejected immigrants but what is known as *vis major*, or inevitable accident.
6. When government has proven to the satisfaction of jury the rejection of immigrants and notice to the steamship company or its agent thereof, the burden of proof is then on the steamship company or its agent to show due return of immigrants to the country from whence they came.

CRIMINAL LAW.

Informations based upon Section 10 of an Act of Congress of date March 3, 1891, entitled "An Act in amendment of the various Acts relative to immigrants and the importation of aliens under contract or agreement to perform labor."

Robert W. Breckons, U. S. District Attorney, for government.

Kinney, McClanahan & Bigelow, for defendants.

CHARGE TO THE JURY.

ESTEE, J. These cases arise upon two informations filed by the United States District Attorney for the District of Hawaii, in which informations the defendant is charged with violating the provisions of an Act of Congress of date March 3, 1891, and entitled "An Act in amendment of the various Acts relative to immigrants and the importation of aliens under contract or agreement to perform labor."

This Act prohibits the introduction into the United States of certain objectionable classes of aliens and provides that when

ships arrive at an American port having on board certain alien immigrants, the inspection officers shall enter them and make an inspection of the aliens on board, or they "may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made." (Section 8 of the Act.)

The special provision of the Act under which these informations are prosecuted, is Section 10 thereof, which reads as follows:

"That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came.

"And if any master, agent, consignee or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from whence they came, or to pay the cost of their maintenance while on land, such master, agent, consignee or owner shall be deemed guilty of a misdemeanor.."

Said section provides further the manner of the punishment for such misdemeanor, namely, by a fine to be imposed.

Under the allegations of one of the informations filed in these cases, which have been consolidated for the purpose of convenience, it appears that:

On the 6th day of September, 1901, one Tatsugoro Muramoto, a Japanese immigrant, came to the port of Honolulu on board of the steamship "Doric," bound on a voyage from the empire of China to the state of California, and for which steamship the defendant herein was the agent; that the said Japanese immigrant is unlawfully in the country, having come here contrary to the provisions of Section 10 of the immigration Act as amended, heretofore quoted, and that the defendant refused to receive back on board the said vessel, refused to detain on board the said vessel and neglected and refused to return to the port from whence he came said Japanese immigrant.

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The same allegations appear in the second information, in relation to two Japanese immigrants, named therein as Hayataro Chakuno and Takichi Kuwano, who arrived here on board the steamship "China," which was bound on a voyage from the empire of China to the state of California, on the 28th day of August, 1901; that the said Japanese immigrants are unlawfully in the country, having come here contrary to the provisions of Section 10 of the immigration Act as amended, hereinbefore quoted, and that the defendant refused to receive back on board the said vessel, and refused to detain on board the said vessel and neglected and refused to return to the port from whence they came, the aforesaid Japanese immigrants.

That defendant is the agent of the said steamship, "China."

It appears that the special immigrants in these cases were removed from on board the respective vessels referred to in accordance with the provisions of Section 8 of the aforesaid Act, and temporarily landed for the purposes of a thorough inspection; that after inspection, they were rejected by the inspection officers and notification of such rejection sent to the defendant herein as agent of the said steamships, "China" and "Doric."

That afterwards said immigrants escaped.

It is claimed by the government that the immigrants referred to were not returned to the port from whence they came by the defendant herein, in accordance with law, but that the defendant herein refused and neglected to do so.

Gentlemen of the jury: I will instruct you as to the law in this case. The facts you are to be the sole judges of.

It is the law, that after immigrants have been examined by the proper inspection officers and a decision adverse to their remaining in the country is arrived at, that their custody is then in the steamship company or its agent; and it is the duty of the steamship company or its agent, after notification of the rejection of such immigrants, to deport them to the country from whence they came.

If, after rejection by the aforesaid immigration officers, and pending deportation, the immigrants, or any one of them, es-

cape from the custody of the steamship company or its agent, then the said steamship company or its said agent, is liable under the law.

If, therefore, you should find, upon a consideration of the facts in these cases, that any one of these immigrants was rejected by the proper inspection officers and due notice given to the steamship company or its agent, to-wit: the defendant herein, and after such rejection and notice and pending deportation, said immigrant escaped, then you must find a verdict of guilty as to the charge in reference to that immigrant; and so on through the two cases.

Gentlemen of the jury, I instruct you further that you cannot consider any attempt upon the part of the defendant to prove due care on its part, or the fact that due care was exercised to prevent the escape of any one of these immigrants. Under the Act of Congress upon which these informations are based, this is no excuse. The steamship company took the risk that the aforesaid Japanese immigrants would not be adjudged competent to enter the country when it brought them, or either of them, to this port, and it must at its peril conform to the provisions of the statute. While this may seem harsh, yet the intent of Congress, as shown in the Act, is clear. Nothing will excuse the steamship company, or its agent (the defendant in this case), but what is known as *vis major* (overwhelming force) or inevitable accident. Nothing has been shown that the escapes in these cases was the result of either of these conditions.

There is one thing further, gentlemen of the jury; you are instructed that in these cases, when the government has established to your satisfaction that these immigrants coming into the United States were rejected by the immigration officers, duly authorized to act in these matters, and the defendant was notified of such rejection, it then became incumbent on the defendant, as I have before stated, to return such immigrants to the port whence they came.

When the government has established these facts to your satisfaction, the burden of proof is cast on the defendant to show that such return was made. As the law has placed the custody

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of such immigrants in the steamship companies, as I have heretofore instructed you, it is not required of the government that it prove that the immigrants were not returned. It is a well settled rule of law, that even in criminal cases, the person within whose knowledge the facts are supposed to lie, is required to prove such facts. I therefore instruct you, that if the defendant in these cases has not made out to your satisfaction that the immigrants were returned to the port whence they came, then your verdict should be guilty.

In arriving at a verdict in this case, gentlemen of the jury, it must be by the unanimous assent of all your members.

Note: See similar case, *H. Hackfeld & Co., Ltd., v. U. S.*, affirmed by C. C. A. Oct. 5, 1903, not yet reported.

UNITED STATES OF AMERICA *v.* WALTER C. PEACOCK.

DECIDED: DECEMBER 24, 1902.

1. Where the allegations of the petition relate to matters peculiarly within the knowledge of the defendant, he cannot deny the same upon the ground of lack of information or belief upon the subject; and if he does so, such denials will be stricken out of the answer on motion.
2. This Court has jurisdiction to entertain a motion to strike out parts of an answer.
3. A defendant cannot in his answer deny knowledge of his own acts; on the contrary he is presumed to know what he does.
4. In a proceeding brought by the Government of the United States under Sections 4142, 4143, of the R. S. U. S., to recover the value of a certain vessel, where the allegations of the petition show that the said vessel was unlawfully registered by the defendant under the laws of the United States, in that he took oath before the Special Deputy Collector of Customs at the port of Honolulu for the District of Hawaii that he was a citizen of the United States at the time of the application for the American registry; that he was the sole owner of said vessel, and that no citizen or subject of a foreign power was interested in the same, when in truth and in fact he was not the sole owner of said vessel, and was not a citizen of the United States at the time of making said application; where the answer filed to said petition by the defendant de-

nied that at the time of making said oath that it was within his knowledge, "although it was within his supposition," that he was not a citizen of the United States; and as to whether or not he took the oath mentioned in the petition, he had no information or belief upon the subject sufficient to enable him to answer the averment, and therefore, and upon that ground, denies that he took the oath in the petition averred; and where the answer alleged further that the legal interest in said vessel was only temporarily in the defendant, the beneficial interest being in an American corporation at the time of the application for an American register, and that defendant believed the said application to be a purely formal affair, and signed the papers submitted to him without reading them, having no knowledge that the said documents signed before the Special Deputy Collector of Customs represented the defendant to be a citizen of the United States, or that no subject or citizen of any foreign power was interested in the said vessel; upon a motion to strike out all of said parts of said answer, *Held:* That the same should be stricken out as sham, evasive, irrelevant and immaterial. That every man is presumed to know of what country he is a citizen, and he cannot rest a denial to a material fact upon the ground that he did not know of what nation he was a citizen.

PROCEEDING UNDER SECTIONS 4142 AND 4143, R. S. U. S.

Motion to strike out parts of answer.

Robert W. Breckons, U. S. District Attorney, for plaintiff.
Fitch & Highton, for defendant.

ESTEE, J. I venture to submit my opinion as to this motion in writing, because my present views may largely control my future action, at the trial of the case, and because this is a case of unusual importance.

This is a motion to strike out parts of the answer filed herein.

This action is brought by the United States against the defendant for the condemnation of that certain vessel known as the "Julia E. Whalen" and the petition alleges among other things, that on the 2nd day of July, 1902, in order to secure the registry of said vessel under the laws of the United States, defendant did take an oath at the port of Honolulu, in the District and Territory of Hawaii, before one R. C. Stackable, Special Deputy Collector of Customs in and for the District and Terri-

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tory of Hawaii, the said R. C. Stackable being then and there an officer authorized to make such registry. That in said oath so taken the said Walter C. Peacock did swear, among other things, that he was a citizen of the United States of America. That when he made such oath he was not a citizen of the United States, which said fact was within his knowledge.

That the said Walter C. Peacock, when he made said oath, also made oath that he was the sole owner of said vessel, and that no subject or citizen of a foreign power was interested in said vessel, which was not true. That the value of said vessel was twenty-five hundred (2500) dollars.

That defendant afterwards, on the 6th day of December, 1902, filed an answer to said petition or complaint, and plaintiff moves to strike out parts of the said answer, in which defendant:

First: "Denies that at the time of taking the oath in said petition averred, if in fact taken by him, it was within the knowledge of the said defendant, although it was within his supposition, that in truth or fact he was not a citizen of the United States of America, or that he was a subject or a citizen of a foreign power, and as to whether in fact or in law he took the oath in said petition mentioned, this defendant has no information or belief upon the subject sufficient to enable him to answer the averment of said petition on that behalf, and therefore placing his denial on that ground, he denies that he took the oath in said petition averred."

This is clearly a sham and evasive answer and it is ordered that the above portion of said answer be stricken out.

And defendant further avers:

Second: "As to whether this defendant, at the time averred in said petition, was not a citizen of the United States but a subject and citizen of a foreign power, this defendant has no information or belief sufficient to enable him to answer the averments of said petition on that behalf; therefore, placing his denials on that ground, he denies said averments and each of them."

Every man is presumed to know what country he is a citizen

of, and he cannot rest a material denial on the ground that he does not know that fact. Let the second denial be stricken out.

Third: "Denies that at the time of the taking of the oath aforesaid, if in fact he took the said oath, he, the said defendant, knew, although he supposed himself to be a subject or a citizen of a foreign power, and denies that within the knowledge of this defendant, in truth or in fact, the statement of this defendant in the said oath, if there contained, that no subject or citizen of a foreign power was interested in said vessel, was not true."

The third and next above denial is sham and evasive and is no denial. Defendant must know what he did and he cannot on oath deny what "he supposed to be true," when he had an opportunity to know the truth thereof. The third allegation of the answer is therefore stricken out.

Plaintiff also moves to strike out that part of the fifth denial commencing at line 13, page 3, and striking out all of the balance of that page, and 3 lines on page 4, ending with the word identical. The whole of the fifth allegation thus stricken out reads as follows:

Fifth: "And the defendant, as a separate and distinct answer to the said petition, herein incorporates each and every his denials aforesaid, and prays that the same may be deemed and taken to be herein incorporated and set forth, and further avers:

"That at the times, or any of them, in the said petition averred, this defendant, individually, had no interest whatever in the said vessel, the 'Julia E. Whalen,' except that the legal title to the said vessel stood temporarily in his name, while the beneficial interest therein was in the Marcus Island Guano Company, a corporation duly organized, existing and doing business under and by virtue of the laws of the Territory of Arizona, United States of America, that the said 'Julia E. Whalen' was purchased by this defendant for said corporation at San Francisco, State of California, and that at the city of Honolulu, Island of Oahu, Territory of Hawaii, aforesaid, and

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on or about July 2nd, A. D. 1902, this defendant was informed and instructed that it was expedient to take out a register for the said vessel, under the laws of the United States, that he applied for said register on or about the date aforesaid, and being then and there under the belief that the proceedings in reference thereto were purely formal, and having no knowledge of the laws of the United States in that behalf, and having no interest in said vessel, except as aforesaid, signed a paper submitted to him for that purpose, at the office of R. C. Stackable, Special Deputy Collector of Customs for the District and Territory of Hawaii, but then and there did not read and had no knowledge of the contents of said paper, but supposed and believed the said paper to be purely formal, and then and there had no knowledge or belief, if such be the facts, that the said paper represented this defendant to be a citizen of the United States, or that no subject or citizen of any foreign power, either directly or indirectly, by way of trust or confidence or otherwise, was interested in the said vessel or in the profits or issues thereof, and that the said paper may be the oath mentioned and averred in said petition; but as to whether it is or no, or of the actual contents of said paper this defendant has no knowledge, although he is informed and believes that the said paper and the oath so averred in said petition are identical."

This is not a denial of any probative fact in the case and this part of defendant's answer is also stricken out. All of the allegations in the above part of defendant's answer, if allowed to remain, would be trifling with public justice and would create false issues to be tried in said cause. Defendant alleges he supposed and believed the affidavit signed by him was purely formal. What does this mean? Can a formal affidavit be anything but a truthful affidavit? Let the whole of subdivision five, commencing with the word "and" on line 13, page 3, be stricken out on the ground that it is sham, irrelevant and immaterial.

It has been held that:

"If the defendant has no information or belief upon a subject sufficient to enable him to answer any allegation of the

complaint, he may so state in his answer, and place his denial on that ground." *Mulcahy v. Buckley*, 100 Cal. 484.

"But a defendant is not at liberty to answer an allegation in this form, when he may be presumed to know, or when he is aware before answering that he has the means of ascertaining whether or not such allegation is true." (*Mulcahy v. Buckley*, 100 Cal. p. 484; *Hathaway v. Baldwin*, 17 Wis. 635; *Goodell v. Blumer et al.*, 41 Wis. 436.)

A person cannot truthfully deny his nationality for no one is presumed to be a man without a country, and it is against common reason to assume that a rational man does not know his nationality. (*Mulcahy v. Buckley*, 100 Cal. 484; *Ziri v. Einstein*, 20 N. Y. Supp. 893; *Union Lumbering Co. v. Bd. of Supervisors Chippewa Co.*, 47 Wis. 246.)

Nor can a defendant deny knowledge of his own acts; on the contrary, he is presumed to know what he does. Defendant's answer that he did not know that he made an affidavit is too absurd for serious consideration. *Brown v. Lacrosse City Gas L. & C. Co.*, 21 Wis. 51; *Humphreys v. McCall*, 70 American Dec. 621; *Starbuck v. Dunklee*, 88 American Decisions, 68; 10 Minn. 168.

The denial of facts presumptively within defendant's knowledge must be in positive form. *Humphreys v. McCall*, 70 Am. Dec. 621.

At common law "no facts could be alleged on information and belief." See note to *Humphreys v. McCall*, supra.

So the allegation that he does not know the law cannot afford any defense. It has been held that false pleading is an abuse of justice. *Smith v. Webb*, 5 Blackf. Ind 288; *Allen v. Wheeler*, 21 N. J. L. 93.

So facts clearly within the knowledge of defendant cannot be denied on information or belief by him. See *Mullally v. Townsend*, 119 Cal. 47; *Mulcahy v. Buckley*, 100 Cal. 484; *Smalley v. Isaacson*, 40 Minn. 450.

To constitute a good denial, it must be certain and definite and must raise some issuable fact in the case which is material.

Pomeroy Code Remedies, Sec. 613; *Verzan v. McGregor*, 23 Cal. 339. So it has been held that no evasive answer is allowable. *Verzan v. McGregor*, supra; *Kulp v. Snyder*, 94 Fed. 613.

It is the duty of courts to control the pleadings in each case, so that justice may be done to all parties, and so that all the real issues between the litigants may be raised, tried and settled. Thus no sham, evasive or improper pleading is allowed.

At page 813 of Volume I of the *Encyclopedia of Pleading and Practice*, it is said that:

"A defendant cannot deny knowledge of his own acts, nor can he deny knowledge of allegations which include a personal transaction with him. In such cases a positive answer is required." See *Lewis v. Acker*, 11 How. Prac. (N. Y. Supreme Court), 163; *Sherman v. Boehm*, 13 Daly (N. Y.), 42; *Knox v. Galligan*, 21 Wis. 470; *Lawrence v. Derby*, 15 Abb. Prac. (N. Y.), 346.

Nor can a party plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to secure positive knowledge of the facts. *Union Lumbering Co. v. Bd. of Supervisors of Chippewa County*, 47 Wis. 246; *Goodell v. Blumer*, 41 Wis. 436; *Mulcahy v. Buckley*, 100 Cal. 484.

In this case it would be against common reason for defendant not to know whether he was an American citizen or an Englishman, or whether he made this affidavit or not.

The question then arises, are the allegations of the answer necessarily within the personal knowledge of defendant? If so, defendant's answer being sworn to, must tell the truth, and he must know what is the truth.

To repeat, I think defendant in the above case must have known whether he was a citizen of the United States or of some foreign power; and if of a foreign power, what one, for every one is presumed to know his nationality, his name, age and race, and all men are presumed to know what they have recently done, like the making of this affidavit.

This action is brought under Sections 4142 and 4143 of the Revised Statutes of the United States. Section 4142 of the Revised Statutes of the United States prescribes, among other things, that:

"In order to secure the registry of any vessel an oath shall be taken and subscribed by the owner or by one of the owners thereof, before the officer authorized to make such registry, declaring, according to the best of the knowledge and belief of the person so swearing, the name of such vessel, her burden, the place where she was built, if built within the United States, and the year in which she was built, or that she has been captured in war, specifying the time, by a citizen of the United States, and lawfully condemned as a prize * * * and declaring his name and place of abode, and if he be the sole owner of the vessel, that such is the case, or if there be another owner, that there is such other owner, specifying his name and place of abode, and that he is a citizen of the United States, and specifying the proportion belonging to each owner, and where an owner resides in a foreign country * * * that the person so swearing is a citizen of the United States, and that there is no subject or citizen of any foreign province or state directly or indirectly, by way of trust, confidence or otherwise, interested in such vessel. * * *"

Section 4143 of the Revised Statutes of the United States prescribes, that:

"If any of the matters of fact alleged in the oath taken by an owner to obtain the registry of any vessel, which within the knowledge of the party so swearing are not true ,there shall be a forfeiture of the vessel, together with her tackle, apparel and furniture, in respect to which the oath shall have been made, or of the value thereof to be recovered, with the costs of suit, of the person by whom the oath was made."

The importance of defendant's evasive answer will thus be observed.

The counsel for defendant claim there is no law governing a United States Court, authorizing a motion to strike out in any case. This does not seem to be true, for it would be

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a denial of justice not to strike out parts of an answer like this, or in all similar instances.

It is held in *Montgomery v. Northern Pacific R. Co.*, Vol. 67, Fed. Rep. 445, that: "Objections to several parts of a complaint or answer constituting a single cause of action or defense must be taken by motion to strike out and not by demurrer;" that case is analogous to the one at bar. See also, *Taber v. Commercial National Bank, etc.*, 62 Fed. Rep. 383, and *Buller v. Sidell*, 43 Fed. Rep. 116.

Counsel for defendant submitted a large number of authorities for the consideration of the court, and while most of them prescribe that when the facts are not known to the pleader, he could make denial on his information and belief, yet none of them held that when the allegations or denials of the answer related to matters peculiarly within the pleader's knowledge, as in this case, he could also make denial on information and belief.

By Secs. 4133 and 4134 of U. S. Revised Statutes, it is prescribed how an American vessel can be registered, and Secs. 4137 and 4138 of the Revised Statutes of the United States prescribe how a vessel belonging to a corporation may be registered; also that sales of vessels must be recorded with customs officers. So Sections 4192 and 4193, Revised Statutes of the United States, provide that no sale of a ship shall be valid unless recorded, and so the record furnishes notice of the ownership.

So it is provided by Sec. 4131, Revised Statutes, that no vessel shall be deemed a vessel of the United States, unless duly registered, and such vessel must be wholly owned by citizens of the United States, and the officers of all vessels of the United States shall be citizens of the United States. So by Sec. 4133 of the Revised Statutes of the United States, before referred to, it is prescribed: "No vessel shall be entitled to be registered or, if registered, to the benefits of registry, if owned in whole or in part, by any citizen of the United States who usually resides in a foreign country, during the continuance of such residence, unless such citizen be a consul of the United States, or an agent for and a partner in some house of trade or co-

partnership, consisting of citizens of the United States actually carrying on trade within the United States."

In this case the question of the citizenship of the owner of this vessel sought to be condemned, largely controls the matter involved.

It has long been the law and the policy of this government to register all American vessels engaged in the foreign trade. This is alike important to American seamen and American commerce. The record of all American vessels is thus found in the customs departments of the nation, and the record primarily shows the ownership of all such vessels. The law makes this record *prima facie* correct, and no collateral attack can be made against such presumption.

The register of American vessels is an accommodation to the ship owner and the sailors. It authorizes the use of the American flag and the protection of American law, and in doing this, our government exercises its sovereignty.

It never knowingly registers a foreign vessel as an American ship, nor does it permit a foreign ship to sail under the American flag. American sovereignty on the land and on the sea means something, and no American or foreigner has ever hitherto been permitted to trifle with the rights of American citizenship. It is too fallacious to bear repeating, that this defendant did not know what nation he was a citizen of; lisping American children know that, and as a rule they are proud of that citizenship. The order of the court is for the parts of defendant's answer referred to above to be stricken out, and that defendant have five days to make and file an amended answer.

Note: Affirmed on appeal by C. C. A., October 5, 1903, not yet reported.

*In re APPEAL OF H. HAMANO FROM DECISION OF
BOARD OF GENERAL APPRAISERS AT NEW
YORK.*

DECIDED: JANUARY 6, 1903.

1. Upon an appeal to this court under Section 15 of the Customs Administrative Act of June 10, 1890 (26 U. S. Stats. 137), by an importer of certain articles of merchandise known as Japanese shoes or slippers, where it appeared that the only ground of protest stated by the protestant in his notice of protest to the Collector under the provisions of Section 14 of the said Customs Administrative Act, and on the hearing had by the Board of General Appraisers at New York, upon appeal from the decision of the said Collector, was error in the classification and assessment of the said articles by the Collector, in that the same should have been classified as "boots and shoes made of leather," under Paragraph 438 of the Tariff Act of 1897 (Vol. 30, U. S. Stats. 193), instead of "manufactures of leather," under Paragraph 450 of said Act; and where the decision of the Board of General Appraisers overruled the protest, but classified the said merchandise as dutiable under Paragraph 93 of said Tariff Act, Held, that protestant cannot on appeal to this court from the decision of the Board of General Appraisers at New York, allege as error on the part of said Board the fact that it disregarded the provisions of Section 7 of the Tariff Act, the so-called "similitude clause." It was not possible under the language of the original protest to do this. The protestant is confined to the allegations of his protest made to the Collector of the Customs and upon which the Board of General Appraisers acted.
2. An importer must stand on the objections raised in the original protest, and cannot vary from nor enlarge them in his petition for review or on the trial.
3. It is prescribed by Section 14 of the Customs Administrative Act, that the person dissatisfied with the decision of the Collector of Customs, shall give notice to the Collector setting forth therein "specifically and distinctly.....the reasons for his objections thereto." That was done by the importer in this case; and that must stand as the alleged error appealed from.
4. While a protest is not required to be made with technical precision, yet it must show that the objections afterwards made at the trial were in the mind of the party, and were brought to the knowledge of the Collector at the time of making them.

5. Where no evidence was offered on the part of protestant at the hearing before the Board of General Appraisers, the said protestant not appearing at said hearing, although due notice had been given him thereof, and the only finding of fact by said Board is as to the materials of which the articles of merchandise are composed, based upon an analysis made by the analyst in charge of the analysis of textile fabrics in the Appraisers' office, the component material of chief value being found to be, not leather, but rawhide; and where said analysis showed that one of the component parts of the said merchandise was iron, *Held*, that as manufactures of rawhide are nowhere provided for in the Tariff Act of 1897, and there is no other component part of chief value, that the classification of the Board of General Appraisers as "articles or wares not specially provided for, composed wholly or in part of iron" (Par. 93, Tariff Act), is the correct one, and the decision of the said Board is affirmed.
6. The Board of General Appraisers was established to determine controversies in relation to the proper classification of articles under the Tariff Act of 1897, and the decision of such Board should not be overruled, unless clearly against the weight of the evidence.

APPEAL FROM DECISION OF BOARD OF GENERAL APPRAISERS
UNDER SECTION 15, CUSTOMS ADMINISTRATIVE ACT OF
JUNE 10, 1890, (U. S. STATS. VOL. 26, P. 131.)

R. W. Breckons, U. S. District Attorney, for the government.

Thomas Fitch & Henry E. Highton, attorneys for appellant.

ESTEE, J. H. Hamano is a Japanese merchant, engaged in business in Honolulu, in the importation and sale of Japanese shoes and slippers.

On the 31st day of December, 1900, certain of these so-called shoes or slippers arriving here from Japan, were classified by the Collector of Customs at Honolulu as "manufactures of leather," and assessed as dutiable at the rate of 35% *ad valorem*, under the provisions of Section 450 of the Tariff Act of 1897 (Vol. 30, U. S. Statutes, page 193), which reads as follows:

"Manufactures of leather, finished or unfinished, or of which these substances, or either of them, is the component ma-

terial of chief value, not especially provided for in this Act.... thirty-five per cent. *ad valorem.*"

Within the statutory time, the said H. Hamano filed his notice of protest and appeal against said classification and duty, with the Collector of the Customs at Honolulu. He appealed pursuant to the terms of Section 14 of the Customs Administrative Act of June 10, 1890, (Vol. 26, U. S. Statutes), and the importer claimed that the articles known as leather shoes or slippers were dutiable under the provisions of paragraph 438 of the Tariff Act of 1897, which reads in part as follows:

"Paragraph 438.....Boots and shoes made of leather, twenty-five per centum *ad valorem*...."

Upon receipt of the said protest and notice of appeal, the Collector of Customs transmitted to the Board of General Appraisers of New York, the protest, invoice, and all the papers connected with the matter of said appraisement.

On the third day of September, 1901, a decision was rendered by the said Board of General Appraisers in New York, in which they state, among other things, that:

"The merchandise in question consists of Japanese slippers, composed of raw hide, cotton, straw, silk, iron, etc.; that they were classified as dutiable as manufactures of leather under paragraph 450 of the Tariff Act of 1897, at 35 per cent. *ad valorem*, and are claimed by the protestant to be dutiable as leather shoes under paragraph 438 at 25 per cent. *ad valorem*. As there is no leather in the articles, raw hide not being leather, it seems that neither of said provisions includes these slippers."

Then follows an analysis, which shows that:

"Rawhide is the component part of chief value, namely, 40.32, while the other proportions of materials are as follows: Straw25.407, cotton....16.599, silk....11.395, iron....2.123, and other materials 4.157."

The decision further stating that: "It would appear from this analysis that there being no provision for the manufactures of rawhide, and none of the other materials being the component of chief value, the particular articles covered by said protest are properly dutiable under paragraph 193, at the rate

of 45% *ad valorem*, as 'articles or wares not specially provided for or composed wholly or in part of iron,'"

"Articles or wares not specially provided for in this Act, composed wholly or in part of iron * * * or other metal, and whether partly or wholly manufactured, 45 per cent. *ad valorem*." Par. 93; page 167, 30 U. S. Statutes.

The decision finally overrules the protest and affirms the decision of the collector, "without, however, approving the classification complained of by the protestant."

Upon the appeal taken to this Court, the appellant alleges as error on the part of the Board of General Appraisers, the following:

"That said board erred in overruling or disregarding the provisions of Section 7 of the Tariff Act of 1897, in that the untanned leather, or rawhide, which is the component of chief value in said shoes, is similar in material, in quality, in texture and in the use to which it may be and was applied, to leather."

This was the first time that protestant raised any question of similitude or intimated any reliance upon the so-called similitude clause of the Act (Section 7 thereof), Vol. 30 U. S. Stats. 205.

In accordance with the petition on appeal to this court, an order was issued out of this court on October 2, 1901, directed to the Board of three General Appraisers at New York, ordering the said board to return to this court the record of said matter, and the evidence taken by them therein, together with a certified statement of the facts involved in said case, and their decision thereon. On November 14, 1901, the said Board of three General Appraisers made a return to this Court, consisting of the letter of the Collector of Customs at this port sent to the said Board of General Appraisers, the original protest of the importer, and the decision of the Board thereon.

Thereafter, upon application of counsel for the importer, this court made an order reciting that, as the original return made to the first order did not contain all the evidence taken by them; that the said Board were directed to return to this Court all the evidence taken in the matter; and also made a further order, at

the same time, to-wit: January 21, 1902, referring the whole subject to H. M. Somerville, one of the said Board of General Appraisers, for the taking of such further evidence in the matter as might be offered by the petitioner or by the United States.

Thereafter, on February 25, 1902, there was returned to this Court a supplemental return from the said Board of General Appraisers at New York, in the same terms as the original return with an additional exhibit in the form of the original analysis of the merchandise in controversy, and stating that, "The importer failed to appear at the hearing, either in person or by counsel, and that no evidence was offered by him, as under the ruling of the Court he was required to do."

A return was also made to the Court on November 25, 1902, by H. M. Somerville, the special appraiser appointed by the Court, to take further testimony, in which he states: "That upon the day set for the taking of the testimony and after the formal notice of the time and place of the hearing had been given to counsel for appellant, naming him, the said counsel failed to appear, or to offer any further evidence."

It appears that in the written notice of protest filed with the Collector of the Customs, and forwarded to the Board of General Appraisers, but one ground of objection was relied upon by the importer, the following being the language of that protest:

"The grounds of our objections are that the said shoes were classified and duty assessed under paragraph 450, Tariff Act of 1897, as manufactures of leather, N. S. P. F., dutiable at the rate of thirty-five per centum (35) *ad valorem*; we claim the said articles to be either a leather shoe or slipper, the same being properly dutiable as specially provided for under paragraph 438, Tariff Act 1897, at the rate of twenty-five per centum (25%) *ad valorem*."

Upon the hearing and in the application for the order to issue to the Board of General Appraisers, it appears that protestant now bases his case on appeal to this Court mainly on the alleged error of the Board of General Appraisers in failing to

consider the similitude clause of the Act, so-called, namely, Section 7 thereof.

It was not possible under the language of the original protest for appellant to do this. He is confined to the allegations of his protest made to the Collector of the Port, and upon which the Board of General Appraisers acted. As was said by the Supreme Court of the United States in the case of *Davies v. Arthur*, 96 U. S. 148:

"Technical precision is not required, but the objections must be so 'distinct and specific' as when fairly construed, to show that the objection taken at the trial, was at that time in the mind of the importer, and that it was sufficient to notify the Collector of its true nature and character, to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect, if it was one which could be thus obviated."

That was an action under the provisions of the Act of 1864, which provided for a suit against the Collector personally to recover duties illegally collected, but which provided that the importer, if dissatisfied with the decision of the Collector, should give notice in writing, setting forth "distinctly and specifically the ground of his objection." This is the law to-day. See Sec. 14, Act of Congress of June 10, 1890, Vol. 1, Supplement of the Revised Statutes, page 571. It is prescribed by Section 14 that the person dissatisfied with such decision (of the Collector of Customs) shall give notice to the Collector setting forth therein "distinctly and specifically.....the reasons for his objections thereto." That was done by the importer in this case, and that must stand as the alleged error appealed from.

See the case of *In re Collector (Sherman et al., Importers)*, 55 Fed. 276, 278, where the Circuit Court of Appeals says:

"Congress reproduced in the Customs Administrative Act the identical language as to the terms of the protest used in the previous Acts, and declared as explicitly as could be done by language, that in the absence of such notice, the decision of the Collector should be final and conclusive. It must be presumed that this was done with the full understanding of the settled

judicial construction of the provision under the previous Acts of Congress, and, therefore, that Congress intended that the importer should be bound by his own statement of the objections to the Collector's decision, and should not be permitted to depart from it, by alleging subsequently any error of fact or of law, not substantially brought to the collector's attention by the terms of the notice."

The Court further saying:

"Congress might have relieved the importer of any such conditions as a prerequisite to his recovery if it had seen fit; but it is plain that it intended only to change the nature of his remedy without enlarging the previously existing conditions precedent to his right of recovery."

See also *Hahn v. Erhardt*, 78 Fed. 620-621 (C. C. A.), where the Court says:

"The similitude provision is intended to prescribe the duty to which articles are to be subjected that have been omitted in the enumeration of dutiable articles in the schedules of the tariff laws. It has no application when the imported articles can be identified with any of those articles described in any of the schedules. If the importer asserts in his protest that his merchandise belongs to the category of enumerated articles, he asserts by implication that its dutiable character is not to be ascertained by reference to the similitude provision."

In this case the importer does claim the dutiable character of the imports to be under paragraph 438 of the tariff law.

See *In re Sherman et al.*, 49 Fed. Rep. 224; *In re Guggenheim Smelting Co.*, 112 Fed. Rep. 517; *Battle & Co. Chemists' Corp. v. U. S.*, 108 Fed. Rep. 216.

To repeat, as to the question of similitude, an importer must stand on the objections made in the original protest, and cannot vary from nor enlarge them in his petition for review or on the trial. *Battle & Co., etc., v. United States*, 108 Fed. Rep. 216; *Arthur v. Morgan*, 112 U. S. 495; *Herman v. Robertson*, 152 U. S. 521; *Heinze v. Arthur's Executors*, 144 U. S. 28; *Presson v. Russell*, 152 U. S. 577; *Hahn v. Erhardt*, 78 Fed. Rep. 620-621; *Davies v. Arthur*, 96 U. S. 148.

So it was held in *In re Guggenheim Smelting Co.*, 112 Fed. 517, that the protest in that case was insufficient in failing to point out the provision under which the Collector should have acted. The Collector's decision must therefore stand.

While a protest is not required to be made with technical precision, yet it must show that the objections afterwards made at the trial were in the minds of the party, and were brought to the knowledge of the Collector at the time of making them.

Arthur v. Morgan, 112 U. S. 495; *U. S. v. Salambier*, 170 U. S. 621, 627; *Shell's Executors v. Fauche*, 138 U. S. 562; *Heinze v. Arthur's Executors*, 144 U. S. 28; *Herman v. Robertson*, 152 U. S. 521.

It seems clear to this Court that if the importer had intended in this case from the beginning to rely upon the similitude clause of the Customs Administrative Act for the purpose of identifying his merchandise, he should have "distinctly and specifically set forth" that fact in his protest to the Collector, as one of the specific objections to the Collector's rulings. It is not possible for this court to now consider on appeal, any ground of protest, unless made to the Collector at the time the classification was made.

Again in this case, the only finding of fact is as to the materials of which the merchandise is composed. No evidence of any character was offered on the part of the protestant. It appears that an analysis was made by Rudolph Streuli, upon which the decision of the Board was based, he being the analyst in charge of the bureau for the analysis of textile fabrics of the Appraisers' office; which original analysis is attached to the supplemental return filed in this case, and which has been examined by the Court. In this analysis rawhide is declared to be the component of chief value. There is nothing in the record, so far as the Court can find, attempting to show that the rawhide, of which these articles are largely composed, is leather. Even if it be conceded that the protestant had the power under his original protest to show that rawhide, such as is used in the manufacture of these articles, is leather, he made no effort to do so. But under the definition popularly accepted of leather,

rawhide is not included. The Century Dictionary, a recognized authority, defines leather to be "the tanned, tawed or otherwise dressed skin of an animal. the peculiar character of leather is due to the chemical combination of tannin in the process of tanning, or of tannin and vegetable extractive matter (or else of some mineral or earthy base) with gelatin as contained in animal skin. Its physical characteristics, such as flexibility, tensile strength, color and durability, are more or less modified by the processes subsequent to the use of the chemical named, and included in the various operations of currying and dressing."

While the same dictionary defines rawhide to be "the material of untanned skins of cattle, very hard and tough when twisted in strips for ropes or the like, and dried."

The distinction evidently being in the tanning or lack of tanning of the skin.

In the absence of any evidence to the contrary, the finding of the fact by the Board of General Appraisers will not be disturbed. *Meyers v. U. S.*, 110 Fed. Rep. 940; *Page et al. v. U. S.*, 113 Fed. Rep. 1006.

While it is true that the amount of iron in these articles is very small, being only 2.122 per cent. of the value of the entire article, as shown by the aforesaid analysis, yet it is sufficient to affect their classification in the event that the same are not otherwise provided for or specially enumerated in the Act. See the cases of *Seeberger v. Farwell*, 139 U. S. 608; *Magone v. Luckemeyer*, 139 U. S., 612; in the latter case it was held that woolen goods, having in the warp quantities of cotton varying from 1.99 to 6 per cent., were sufficient to have that effect.

And in this case, the component part of chief value is not leather, but rawhide, which is nowhere provided for in the Act, and as there is no other component material of chief value, then the classification of the Board of General Appraisers as "articles or wares not specially provided for, composed wholly or in part, of iron," (Paragraph 193 of the Tariff Act of 1897) would seem to be the correct one.

The Board of General Appraisers was established to determine controversies in relation to the proper classification of articles

under the Tariff Act of 1897, and the decision of such Board should not be over-ruled unless clearly against the weight of evidence. *Bader v. U. S.*, 116 U. S. 541, 548. There is no conflict of evidence in this case, because the importer has presented no testimony.

An importer after appealing to the Board of General Appraisers must appear at the hearing or the action of the Collector will be affirmed.

See the case of the *United States v. China and Japan Trading Co.*, 71 Fed Rep. 864, where it was held that if an importer who has appealed to the Board of General Appraisers from the decision of the Collector as to the classification of merchandise, fails to appear pursuant to such Board's notification to show cause why the action of the Collector should not be affirmed, the Board is entirely justified in affirming the Collector's decision, without regard to its correctness.

In this case, although it came before the General Appraisers twice, notice being given the attorney for the importer each time, the importer never introduced one word of testimony.

It is now over two years since this appeal was first taken, and during all that time petitioner has taken no apparent interest in the case.

It has been held that the burden is on the importer on appeal to prove that the Collector's action was wrong, and if he fails in sustaining this burden, the action of the Collector stands, even though it appears that the Collector has selected the wrong paragraph. *Tiffany v. U. S.*, 105 Fed. 766.

There is no controverted question of fact in this case, because the importer at no time appeared before the General Board of Appraisers to controvert the action of the Collector. *Bader & Co. v. United States*, 116 Fed. Rep. 541. For the following, among other reasons, the action of the general appraisers is confirmed, with costs:

1st. That the similitude statute does not apply in this case, and

2nd. That the importer did not appear before the Board of General Appraisers at the trial.

APRIL, 1903.

JOHN D. SPRECKELS & BROTHERS COMPANY v. THE
STEAMSHIP "NEVADAN" AND AMERICAN HA-
WAIIAN STEAMSHIP COMPANY.

DECIDED: APRIL 6. 1903.

1. The United States District Court for the Territory of Hawaii is a court of Federal jurisdiction only, made so by Section 86 of the Act of Congress of April 30, entitled "An Act to provide a government for the Territory of Hawaii" (Vol. 31, U. S. Stats., P. 141).
2. Act 45 of the Session Laws of the Legislature of Hawaii (1898) requiring all foreign corporations to file in the office of the Treasurer of the Territory a certified copy of the charter or act of incorporation of such corporation or company, names of the officers thereof, the name of some person upon whom legal notice and process from the courts of the Territory may be served and a certified copy of the by-laws of such corporation "under penalty of being deprived of the right to sue in any court of the Territory for any cause of action whatever, while such refusal or neglect continues, does not apply to actions in admiralty instituted in the United States District Court of Hawaii.
3. In an action in admiralty where the libellant was shown to be a corporation organized under the laws of the State of California, upon a motion to dismiss the libel made during the progress of the trial, based upon the fact that libellant had not complied with the provisions of Act 45 of the Session Laws of 1898 of the Republic of Hawaii, continued in force by the Act of Congress passed for the government of the Territory; Held, that the provisions of such law related only to the territorial courts, and that in no event could a law of that character affect the jurisdiction of the United States District Court of Hawaii in relation to admiralty cases. The motion denied.

IN ADMIRALTY. MOTION TO DISMISS LIBEL.

Hatch & Silliman, for libellant.

Kinney, McClanahan & Bigelow, for libellee and intervenor.

ESTEE, J. This is a libel for salvage filed on behalf of J. D. Spreckels & Brothers Company, as owner of the steam tug "Fear-

less," and for the master and crew thereof, for salvage services alleged to have been rendered to the steamship "Nevadan," on the evening of the 8th day of December, 1902, when the said steamship "Nevadan," while proceeding down the channel from the port of Honolulu, Island of Oahu, Territory of Hawaii, to the port of Kahului, on the Island of Maui, in said Territory, went ashore upon what is known as the "Miowera" reef, on the west side of the channel, at a point distant about sixty yards from the buoy known as the "can" buoy, the said steamer being aground on the said reef at a point about one hundred feet from the stem of the said steamer.

The American Hawaiian Steamship Company, the alleged owner of the "Nevadan," intervened and filed an appearance and claim and answered the libel herein.

Among the recitals in the libel, the following language was used:

"The libel and complaint of J. D. Spreckels & Brothers Company, a corporation organized and existing under and by virtue of the laws of the state of California, the owner of the steam tug 'Fearless'..... articulates and propounds as follows:...."

No direct allegation of the incorporation of the libellant or further reference to its incorporation was inserted in said libel, and no reference was made to this recital in the answer of the respondent and intervenor herein. On the hearing the articles of incorporation of the libellant were introduced without objection.

The case was referred to E. S. Gill, Esq., U. S. Court Commissioner, to take certain testimony, which was done; and thereafter, on the 24th day of March, 1903, the case came on regularly to be heard before the court upon the testimony already taken and upon the further testimony to be taken by the court.

After the libellant had introduced the major portion of its testimony, and before resting its case, the respondent intervenor made a motion in open court, to dismiss the libel of complainant; said motion was based on the affidavit of E. B. McClanahan, Esq., one of the attorneys for the respondent intervenor, and the

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affidavit of Henry C. Hapai, Esq., Register of Public Accounts of the Territory of Hawaii, in the office of the Treasurer thereof.

The contention of said motion and affidavit is briefly this: that the plaintiff or libellant herein has failed to comply with the provisions of Act 45 of the Session Laws of 1898 of the Republic of Hawaii, and by such failure has lost its right to sue in this Court, and, therefore, this Court has no jurisdiction over the action.

It seems that by Section 1 of said Act 45 of the Session Laws of 1898 of the Republic of Hawaii, entitled an "Act relating to corporations and incorporated companies organized under the laws of foreign countries and carrying on business in this Republic...." and repealing certain prior acts on the same subject, it is prescribed as follows:

"Section 1. Every corporation or incorporated company formed or organized under the laws of any foreign state, which may be desirous of carrying on business in this republic and to take, hold and convey real estate therein, shall file in the office of the Minister of the Interior (now the office of the Treasurer of the Territory, under the provisions of the Act of April 30, 1900, of the Congress of the United States providing a government for the Territory of Hawaii, Vol. 31, U. S. Statutes, P. 141.):

1. A certified copy of the charter or act of incorporation of such corporation or company;
2. Names of the officers thereof;
3. The name of some person upon whom legal notices and process from the courts of this Republic may be served;
4. A certified copy of the by-laws of such corporation or company." (*Laws of the Republic of Hawaii*, Session of 1898, P. 89, 90, 91.)

Section 5 of the same Act provides that any such corporation failing to comply with the terms of this law shall be—

"* * * * denied the benefit of the laws of the Republic

(of Hawaii) particularly the statute limiting the time for the commencement of civil actions, and shall not be entitled to sue in any court of the republic for any cause of action whatever while such neglect or refusal continues."

This is a statute of the Republic of Hawaii, passed by its legislature prior to the annexation of the Republic to the United States and its transformation into a territory thereof. And while the Enabling Act passed by Congress on April 30th, 1900, continued many Hawaiian laws in force, including this one, it only continued this law in force for the purpose for which it was enacted. And so said Act 45 can have no bearing, even remotely, upon the case at bar. The United States District Court for the Territory of Hawaii is a Court of Federal jurisdiction only, made so by the provisions of Section 86 of the Act of Congress of April 30, 1900 (Vol. 31 U. S. Stats., P. 141) and under the terms of said Act, it is provided that:

"Said Court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States....." and the judge of said Court is to exercise in the Territory of Hawaii, "all the powers conferred by the laws of the United States upon the judges....of the District and Circuit Courts of the United States."

By subdivision 8 of Section 563 of the Revised Statutes of the United States, it is prescribed that the Districts Courts of the United States shall have jurisdiction of

"All civil causes of admiralty and maritime jurisdiction.... and such jurisdiction shall be exclusive except in the particular cases where jurisdiction of such causes and seizures is given to the Circuit Courts...."

It seems hardly necessary for this court to consider at length this question as to whether or not it is the duty of all foreign corporations to file the papers indicated in Section 1 of said Act 45 of the Session Laws of the Territory of Hawaii referred

to, before they can sue in an action in admiralty in this Court. The fact that Congress in the Enabling Act, so-called, (the Act of April 30, 1900, hereinbefore referred to) continued in force certain Acts of the Legislature of the Republic of Hawaii, cannot be taken as an Act of Congress controlling or changing the original admiralty jurisdiction given to the United States District Courts, unless it clearly appears to be so intended. The clear intent of the Act so continued in force must be sought for in the language of the Act itself, and it seems quite clear to the Court that the provisions of Act 45 of the Session Laws aforesaid, as to the deprivation of the right to sue, etc., can relate only to the territorial courts; and in no event could a law of that character affect the jurisdiction of the United States District Courts in relation to admiralty cases.

While an Act of a Legislature of a state may absolutely limit the right or capacity of a foreign corporation to do business or to take, hold and dispose of real estate within its limits, or may give such foreign corporation such right upon compliance with certain conditions, yet it is well established that it cannot in any manner or form restrain or limit the jurisdiction of a Federal Court. And if this Court were to hold that such Act 45 applied to the United States District Court of this Territory it would be an actual restraint upon the jurisdiction thereof.

As was said by Mr. Justice Story in the case of "*The Chusan*," 2 Story, 455, Fed. Cases No. 2717, Vol. 5, Fed. Cases, P. 680, 682-3:

"In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress; and, in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules; to limit, control or bar suits in the na-

tional courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least, so far as I have any knowledge, either by any state court, or national court within the whole Union."

See also *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, 94 Fed. 180, (C. C. A.); *New Zealand Insurance Co. v. Earnmoor S. S. Co., Limited*, 79 Fed. 368 (C. C. A.); *Barling et al. v. Bank of British North America*, 50 Fed. 260 (C. C. A.); *Columbia Wire Co. v. Freeman Wire Co. et al.*, 71 Fed. 302-3, in which latter case the exact point was raised and denied, i. e., as to the necessity for complainant to comply with the foreign corporation law of the state of Missouri, by filing a copy of its charter, etc., with the Secretary of State, before bringing suit in the Federal Court.

In the case of *Barling et al. v. Bank of British North America*, 50 Fed., and which was not an admiralty case, the same point was squarely decided in favor of the complainants by the Circuit Court of Appeals of the Ninth Circuit; the court holding that the provisions of an Act of the Legislature of California entitled "An Act concerning corporations and persons engaged in the business of banking," and which provided that no corporation or person "who shall fail to comply with the provisions of this law shall maintain or prosecute any action or proceeding in any of the courts of this state," did not apply to the national courts.

See also, *Workman v. New York City*, 179 U. S. 552.

The motion of the respondent intervenor is denied.

JOHN D. SPRECKELS & BROTHERS COMPANY v.
THE STEAMSHIP "NEVADAN" and AMERICAN
HAWAIIAN STEAMSHIP COMPANY.

DECIDED: APRIL 6, 1903.

1. Where a large freight steamer, the Nevadan, is stranded on a coral reef in the channel of Honolulu harbor for two hours and a half,

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and is finally relieved from her peril through the efforts of a steam tug, the *Fearless*, and said steamer *Nevadan* slips off the reef into deep water and starts out to sea dragging the tug (which is still attached to her by the hawser), stern foremost; *Held*, that this was a part of the *res gestae*, and was a danger incurred by the salving tug which should be considered in estimating the character of the salvage services rendered.

2. No vessel lying on a reef is in a position of safety; and it is not necessary to constitute a salvage service that the distress in which a vessel is in should be immediate or the danger absolute. It is sufficient, if at the time the assistance is rendered, the vessel has encountered any misfortune or danger which might possibly expose her to serious injury.

IN ADMIRALTY. LIBEL FOR SALVAGE.

Hatch & Silliman, Holmes & Stanley, for libellant.
Kinney, McClanahan & Bigelow, for intervenor.

This is a libel for salvage, filed on behalf of J. D. Spreckels & Brothers Company, as owner of the steam tug "Fearless," and for the master and crew thereof, for salvage services alleged to have been rendered to the steamship "Nevadan" on the evening of the 8th day of December, 1902, when the said steamship "Nevadan," while proceeding down the channel from the port of Honolulu, Island of Oahu, Territory of Hawaii, to the port of Kahului, on the Island of Maui, went ashore upon what is known as the "Miowera" reef, on the west side of the channel, at a point distant about sixty yards from the buoy known as the "can buoy;" the said steamer being aground on the said reef at a point about one hundred feet from the stem of the said steamer.

The American Hawaiian Steamship Company, the alleged owner of the "Nevadan," intervened and filed an appearance and claim and answered the libel herein.

The facts in the case briefly appear to be the following:

The steamship "Nevadan" is owned by the American Hawaiian Steamship Company. It has a gross tonnage of 4408; length of 360 feet; depth 24 feet; beam 46.2, and its draft is 16.2 forward and 15.7 astern. On the evening of the eighth

of December, 1902, at or about the hour of 6:30 o'clock p. m., the said steamship left the port of Honolulu, bound upon a voyage to the port of Kahului, on the Island of Maui, in the Territory of Hawaii. She was in command of Henry F. Weedon, her captain, and with no licensed pilot aboard. The captain admittedly held no license as pilot for the port of Honolulu, until March 12, 1903, (some months after the stranding of his vessel) on which date a pilot's license was issued to him for, as appears in said license, "previous experience on ocean steamers," by the United States Local Inspectors for the District of Juneau, Alaska, then at the city and county of San Francisco, State of California. (Libellees' Exhibit "G.")

While said steamship was proceeding down the channel at the entrance of the harbor of Honolulu, she stranded upon a well known reef called the "Miowera" reef, on the west side of the channel. This was about 6:45 p. m. The accident to the "Nevadan" was witnessed by the Young Brothers, who are engaged in the launching and general boatman business at this port. One of them, Herbert Young, went out to the "Nevadan" to tender his services, and Captain Weedon told him to go in and get the "Fearless," which he did.

The "Fearless" is a steam tug belonging to the libellant corporation herein, and engaged in the general towing business in the port of Honolulu, and incidentally thereto the salvage business. It is a very large tug, having a length of 99.6 feet, a tonnage of 160, breadth of beam 22.75, a draft of 12.2 feet, and 600 horse power. This tug is constantly ready, so far as its apparatus and machinery are concerned, to go out either as a tow boat or to rescue vessels from danger, either actual or impending. The tug always has her fires banked so that she can get up steam as was testified to, from within "five to fifteen minutes," depending upon the necessities of the case. Her usual crew is ten men. On the evening of the 8th of December, 1902, the "Fearless" was notified by one of the Young Brothers that she was wanted by the "Nevadan" to help her out of her predicament, and immediately started out to the "Nevadan," with

a crew of seven men, including the captain, aboard. This crew consisted of Captain Olson, G. Scott, the engineer, the assistant engineer, whose name was not disclosed by the testimony, S. P. Murphy, the mate, Hearst, a deck hand, and Williams, a deck hand employed to act as such on that evening, and the Chinese fireman.

In the meantime, the "Nevadan" had put out a kedge anchor with the assistance of the gasoline launch of the Young Brothers, and had hove it home; and had again ran the kedge anchor out for the second time across the channel and embedded it in the coral on that side of the channel. She had been on the reef an hour or more before the tug reached her, and had been making efforts to release herself by the emptying of over a hundred tons of water from certain forward water ballast tanks, and the filling of the after tanks, in addition to the dropping of the kedge anchor, weighing some nine hundred or more pounds.

When the "Fearless" came alongside, and asked if assistance was needed, some conversation ensued between the two captains as to the payment for the services to be rendered. There is a serious conflict in the evidence on this point. Captain Olson claims that he said he would take her off for five thousand dollars, while Captain Weedon states that the amount suggested was \$1000. No agreement, however, was entered into, for Captain Olson left the "Nevadan" and steamed out into the channel and turned round. After some little time she came back, when Captain Weedon called to Captain Olson to "give him a line," or to "pass his hawser aboard," or words to that effect. With some little difficulty, owing to the fact that the line attached to the kedge anchor and to the "Nevadan" was lying straight across the channel, and which had to be cut by the "Fearless" in order to avoid getting her propeller wound up in it, the tug finally was made fast to the steamer. As soon as this was done, namely, about 7:45 p. m., the tug took her position dead astern of the steamer and began pulling. This was continued for over an hour, the tug changing her position towards the last and veering more across the channel at right angles to the "Nevadan," when that vessel finally came off the reef and started out

the channel to the open sea, pulling the tug, stern foremost, behind her. This was about 9:05 or 9:10 p. m.

The weather was somewhat cloudy, but not unusually so; the sea was comparatively smooth, with the exception of blind rollers surging in towards the reef upon which the "Nevadan" lay; the night was dark, and there was little or no wind until about 8:30 or thereabouts, when a fresh breeze came up.

The "Nevadan" is of the value of about \$350,000. Her cargo was of the value of \$64,248. She had in addition to this cargo, some 2500 barrels of oil on board, but as to the value of this no testimony was introduced. The tug was shown to be of the value of \$75,000, kept up at a monthly expense of three thousand dollars.

"Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril at sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict or recapture." *The Blackwell*, 10 Wall. 1; *McConnochie v. Kerr et al.*, 9 Fed. 50, 53; *Murphy et al. v. The Ship Suliote*, 5 Fed. 99.

In determining the amount of salvage to be awarded in any given case, many elements are to be taken into consideration; among them being the value of the property salved and the degree of danger from which it was rescued; the value of the property employed by the salvors and the risks incurred by such salvors in rescuing the property salved from danger; the labor expended by the salvors and the skill and energy displayed in rendering the salvage services. *The Mary E. Dana*, 17 Fed. 353; *The Queen of the Pacific*, 21 Fed. 459; *The Glengyle*, Eng. Appeal Cases (1898), 519.

It must be admitted beyond a doubt that the "Nevadan" was in danger when she lay on this reef with her valuable cargo aboard. Ships are made to sail the sea, not to navigate the land. The reef where she lay is composed of sand and coral, and the waters about it are full of boulders. The reef has a gradual slope of some thirty feet. It rises "like a precipice, or *pali*, up and down." This latter fact was testified to by the witness, Wil-

liams, who swore to having been often round this reef fishing for lobsters.

No vessel lying on a reef is in a position of safety. It is the common knowledge of all seafaring men that where there is a reef there is a heavy sea, if there is any sea at all running. Indeed, the Official Map of the Harbor of Honolulu, introduced in evidence and marked "Libellant's Exhibit 3," indicates this reef with the following words: "always breaks." And the least sea would raise a ship lying in the position in which the "Nevadan" lay, so that when she fell, she would strike heavy and would be likely, if she remained long on the reef, to pound to pieces. Fortunately there was no unusual sea on the night the vessel was stranded.

It is, however, not necessary to constitute a salvage service, that the distress in which a vessel is in should be immediate, or that the danger should be imminent or absolute; it is sufficient, if at the time the assistance is rendered, the vessel has encountered any misfortune or danger which might possibly expose her to destruction or serious injury, were the services not rendered. *The Charlotte*, 3 W. Rob. Adm. 6; *The St. Paul*, 86 Fed. 340.

As was said by Judge Lacombe of the Southern District of New York, in the latter case, where the "St. Paul," a steamer of 1224 tons register, had stranded on Long Island, (quoting from page 343)—

"There was, of course, no 'imminent danger,' possibly no remote danger, of her breaking up. She had made a bed for herself in the sand, her keel resting on a substratum of tough clay, and, so far as the proof shows, although there were rocks near her, there were none under her. The water was likely to cut out the sand at one place and heap it up at another; but, although that would subject the ship to unequal strain, it may be that she was too strongly built to break her back, so long as her keel rested on the clay. But, even if, as appellant contends, she might have remained there in safety for an indefinite length of time, we cannot accede to the proposition that she was not thereby exposed to risk of loss. . . . While she lay on the Jer-

sey beach, she was making nothing for her owners, either in money or in reputation, but quite the reverse, and her value as an ocean liner was certainly exposed to great risk of deterioration."

A decided effort was made at the trial of this case to show that the "Nevadan" came off the reef by her own efforts. This is not borne out by the facts. The "Nevadan" had been on the reef for some time, a full hour before the tug took hold of her, and she had tried to get off by all means in her power and with the assistance of the Young Brothers' gasoline launch, but she remained fast. After the "Fearless" commenced tugging on her, she still remained fast for another full hour or more and she only came off when the tug changed her relative position to the ship, by veering across the channel a little more at right angles with the "Nevadan." It is easy, and indeed usual, after a ship is out of danger for the officers who are most to blame in incurring such danger, and when it is a thing of the past, to claim all the credit for relieving the ship. It is true that the engineer of the "Nevadan" had gotten up steam in both her boilers, and a kedge anchor had been placed across the channel and hove home once; all with the hope of pulling her off by this means and by the lightening of her forward ballast, by emptying the forward tanks, and the increasing of her after ballast by the filling of the aft tanks. But this had no appreciable effect upon the condition of the ship. It is in evidence also that just before the "Nevadan" came off the reef, the steam having been equalized in both her boilers, the engines of the "Nevadan" were started immediately both dead astern, with an average steam pressure of 175 pounds. It is claimed by the captain and engineer of the "Nevadan" that it was due to this fact alone the vessel yielded and floated out into the channels, as for over half an hour previous the engines had not been working.

The fact that the engines were started astern just about the time the vessel came off the reef may have had some influence in the final moving of the ship and may possibly have contributed to that result, but this can never be absolutely demonstrated. It remains true that the "Fearless" had been working from

"7:46 p. m.," as appears by the ship's log book, until "9:05 p. m." pulling steadily in a series of jerks. Says Murphy, the mate of the "Fearless," "We started to jerk on her; we would go ahead full speed, and wait a little and then go ahead again."

This was kept up until the ship was finally off the reef, possibly at or about the time the engines were started astern. It seems to me that without the tug or some other equally potential power outside of the vessel, as shown by the facts in this case, the "Nevadan" would never have come off the reef. That this was evidently the opinion of Mr. Morse is clear. Mr. Morse is admittedly the freight agent of the intervenor at Honolulu, and was on board the "Fearless" at the time she went out to the rescue of the "Nevadan." He left the "Fearless" in a launch and went into town and interviewed Captain Whiting, the Naval Commandant of the Port, as to whether it would be possible to get the "Iroquois," a government steam tug, to go to her assistance. It is not stated why the "Iroquois" did not go, but it is in evidence that Captain Whiting stated that would take four hours to get up steam on her, as testified to by Mr. Morse. Whether or not Mr. Morse acted in an official capacity in interviewing the Naval Commandant is not a material fact in this case. That he was the freight agent of the company and the only official of the general agents at the scene of the disaster on the night in question is unquestioned, and his visit to the Naval Commandant is a significant one. It would seem that he thought the "Fearless" would be unable to pull the "Nevadan" off unaided by other vessels.

The "Fearless" was not occupied for any great length of time after she had made fast to the "Nevadan," in accomplishing the purpose for which she had been sent for, but as to this shortness of time, the "Nevadan" should not complain. It would seem to have been a matter of congratulation. The longer the vessel remained in her dangerous position the more likely was she to become seriously disabled. And as was said by Dr. Lushington, the eminent English authority on admiralty, "the patient should not complain of the shortness of the operation." *The General Palmer*, 5 Notes of Cases, 159.

Now as to the danger to the tug. It was night when the tug reached the "Nevadan" and made fast; there were no lights on the buoys in the harbor. And right here I would add that this is a matter of surprise to me. It appears that when the regular pilots take ships out of the port of Honolulu at night they place lights on the buoys along the channel; but when a ship goes out without a pilot, she must either go in the daylight or run the risks incident to the darkness, as no lights are on the buoys. It seems to me that this looks a little like a premium on the services of the local pilots.

The channel is a narrow and tortuous one, bounded on each side by coral reefs, and there was the possible danger to the "Fearless" of going on the reef herself that night, for in manipulating in the dark, the hawser might have broken or got wound up on the propeller of the tug, and in the shallow waters near the reef, the tug might have been drawn on to the reef. Says Murphy, the mate of the "Fearless:" "If the hawser had carried away, we were close in; we would have sped dead ahead upon the reef, like a shot out of a gun; nothing could have saved her."

But the hawser did not break, and the fact that no injury befell the tug at this point does not militate against the meritorious character of the services rendered by the tug in the face of what might have happened, which possibly was one of the risks incident to this employment. The serious danger to the "Fearless" in the estimation of the Court, arose from the fact that when the "Nevadan" slid off the reef into deep water, she immediately started out of the channel towards the sea, pulling the tug stern first after her, which fact caused the tug to list, as was testified to by several of the libellant's witnesses, in degrees varying from thirty-five to forty-five degrees; the tug at the same time shipping a great deal of water and being in danger of being capsized.

Captain Olson not only blew a signal of three blasts to notify the "Nevadan" to let go his hawser, but also called out to that effect. This signal was understood by the captain of the "Nevadan" and his officers, and that interpretation given it, as ap-

pears by the sworn answer in the case; although Captain Weedon made an attempt to shift in his testimony by stating that by the International Rules of Navigation, the signal given by the "Fearless" of three blasts, meant "I am coming astern." Under the circumstances, there is rather a grim humor in this interpretation, for there was no doubt the tug was "coming astern" in more ways than one. But, upon this point, Captain Weedon also testified that he had been a master of sailing ships for fifteen years, and that he had only been master of a steamship for from 18 to 20 months; and that during all of his experience as a sailing master he understood the signals in question to mean "let go my hawser."

But in addition to this, it appears that this signal was perfectly understood by the officers of the "Nevadan." The second mate, Lauriatt, stated that he heard the calls from the tug to let go the hawser, and dispatched a messenger, the boatswain, Mullins, forward to the captain for instructions as to what should be done.

There appeared to be no unnecessary haste on the part of the "Nevadan's" officers to relieve the tug's predicament. Mullins, the boatswain, testified that it was "fifteen minutes from the time of the first call until we let go the hawser." In the meantime, the tug was in her perilous position underway and being pulled out to sea, stern foremost. The hawser was taut, and the danger lay, as was expressed by the mate of the "Fearless," who was at the wheel, in the fact that "the boat had a big vessel pulling her stern foremost and she had no control of her engines.... I couldn't control the boat....she would not answer her rudder."

It is claimed that the tug might have relieved her peril by cutting the hawser. This may be true, but in the excitement and peril of the occasion that was not done, although an order was given by Captain Olson to cut the hawser. One man, Williams, a deck hand, stated that he was too terrified to act, testifying: "I thought it was all day for me....I thought she was going down....and I ran forward ready to jump overboard and swim ashore."

It must be admitted that the danger the tug was in arose from her employment and was a consequence of her efforts to assist the ship off the reef, and was a part of the *res gestae*. It was evident that the "Nevadan" was not deemed quite out of danger when she started out the channel, moving at the rate of from three to four knots an hour, and continued to haul the tug stern foremost after her. Says Herbert Young, "she pulled the 'Fearless' stern first until she was outside of danger." While Captain Weedon testified upon this point as follows:

"The Court: It was not seamanlike, was it, to pull a little boat astern?

"A. No; but under the conditions we could not avoid it."

The only natural inference to be drawn from this is that in his anxiety for the safety of his own ship, the captain of the "Nevadan" was regardless of that of the tug.

Some time was devoted on the hearing, to prove that some sort of a contract was entered into between Captain Olson and Captain Weedon for the services to be rendered. It is true that the captain of the "Nevadan" and the freight agent of the American Hawaiian Steamship Company, Mr. R. P. Morse, the latter being aboard the "Fearless," both testify that Captain Olson said he would take \$1000 to pull the vessel off the reef; yet no one else so understood Captain Olson, who, with five other witnesses on board the "Fearless," testified that if any offer was made, it was a \$5000 one. All were apparently truthful, but there was certainly a mistake somewhere. Mr. Bray, a newspaper man, and Mr. Merry, both on the "Fearless," and both disinterested men, sustained Olson's testimony to the effect that Captain Weedon said he would only give \$500, and that Captain Olson said he would charge \$5000 for pulling the "Nevadan" off. I cannot, however, in estimating the amount of judgment in this case, base it upon any contract alleged to have been made. It must be estimated from a general salvage point of view simply, as there was no meeting of minds between the two captains sufficient to form a contract, and there was no contract.

"There is a marked and clear distinction between a towage and a salvage service. When a tug is called or taken by a sound

vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage; but if the vessel is disabled and in need of assistance, it is a salvage service. In cases of simple towage only a reasonable compensation is allowed, as upon a *quantum meruit*. In cases of salvage, the award is upon a broader and more liberal scale."

The Flottbek, 118 Fed. 954, 960; *McConnochie v. Kerr et al.*, 9 Fed. 50, where Judge Brown says, in making the distinction between towage and salvage cases, (P. 53):

"A salvage service is a service voluntarily rendered to a vessel needing assistance, and is designed to relieve her from distress or danger, either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage without reference to any circumstances of danger." *The Veendam*, 46 Fed. 489; *The Grinn Dollar*, 103 Fed. 668.

I shall not attempt to analyze the various cases submitted by counsel for libellant and counsel for libellee upon the question of the amount of salvage to be awarded. It is natural that in the one instance cases should be cited where the awards are very heavy, and on the other, cases where the awards are low. No two cases of this character are alike, and while the Court always pays due deference to the opinions of the Courts of Admiralty, yet in this case, as in all cases brought before it, its judgment must be controlled largely by the circumstances peculiar thereto.

The single question is, in view of all the circumstances of this case, what amount of salvage is reasonable, for the Court holds that the "Fearless" and the owners thereof, are undoubtedly entitled to a judgment of salvage. As was once said by the Supreme Court of the United States, "salvors' services should be sedulously fostered; and hence they should receive compensation, not as mere pay for work and labor done, nor even as limited to the precise quantum of benefit in the particular case, but on a scale so liberal as to best encourage such services." *The Comanche*, 8 Wall. 448, 465.

The value of the property salved herein, both the vessel and cargo, is admitted to be some \$414,248. I think a reasonable

salvage award would be an amount equal to one and one-half per cent. of the value of the salved property, or \$6213.72, and so hold, the same to be distributed as follows:

To the captain of the "Fearless," \$350; to Scott, the chief engineer, \$150; to Murphy, the mate, \$150; to the assistant engineer, \$100; to the two seamen, Williams and Hearst, \$75 apiece, and to the fireman, \$50; the balance of \$5263.72 to go to the libellant herein as the owner of the tug "Fearless;" together with costs in this suit incurred.

Let judgment be entered accordingly.

UNITED STATES OF AMERICA *v.* H. HACKFELD & COMPANY, LTD., a corporation.

(12 Cases.)

DATED: APRIL 21, 1903.

1. The legal custody of alien immigrants is in the ship bringing them to this country until the final completion of the examination of such alien immigrants by the proper inspection officers, notwithstanding they may have been removed from the ship for the purposes of such examination.
2. The temporary removal for purposes of inspection provided for by the statute is simply for the convenience of the shipping people, and to prevent delay in the completion of the voyage of the vessel to its terminal point; and in the language of the statute, such "temporary removal shall not be considered a landing pending such examination."
3. Alien immigrants are treated as being still on board the vessel, and until they are declared to be lawfully entitled to enter the United States, the responsibility for their safe-keeping is with the vessel or its agent.
4. The vessel or its agent cannot avoid responsibility by claiming or proving that any officer or employe of the United States assumed to look after these alien immigrants.
5. If, pending an examination and inspection by the proper officers, any alien immigrant escapes into United States territory, such escape is "a negligent landing.....at a time and place other than that designated by the inspection officers," within the meaning of Section 8 of the Act of March 3, 1891, relative to alien immigrants, etc.

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6. After alien immigrants have been examined by the proper inspection officers and a decision adverse to their landing has been arrived at, the custody of such immigrants continues in the ship or its agent; and it is the duty of the ship or its agent, after notice of the rejection of such alien immigrants, to deport them to the country from whence they came.
7. If, after rejection by the proper inspection officers and pending deportation, any alien immigrant escapes into United States territory, then the said ship or its agent is liable under Section 10 of the Act of March 3, 1891, relative to alien immigrants, etc.
8. Due care on the part of the steamship company or its agent to prevent the escape of alien immigrants is no excuse under the law, and cannot be proven.
9. Nothing will excuse the steamship company or its agent, but what is known in law as *vis major*, or inevitable accident.
10. When the government has proven to the satisfaction of the jury, the inspection and rejection of alien immigrants, with due notice thereof to the steamship company or its agent, the burden of proof is cast on the defendant to show that the said alien immigrants were returned to the country from whence they came.

CRIMINAL LAW.

Twelve informations based on Sections 8 and 10 of the Act of Congress of March 3, 1891, entitled "An Act in amendment of the various Acts relative to immigrants and the importation of aliens under contract or agreement to perform labor."

Robert W. Breckons, U. S. District Attorney, for the government.

Kinney, McClanahan & Bigelow, attorneys for the defendant.

CHARGE TO THE JURY.

ESTEE, J. These cases arise upon twelve informations filed by the United States District Attorney for the District of Hawaii, in which informations the defendant is charged with violating the provisions of the Act of Congress of date March 3, 1891, entitled "An Act in amendment of the various Acts relative to immigrants and the importation of aliens under contract or agreement to perform labor." (1 Supp. R. S. U. S., P. 934.)

Each of these informations contains two counts, one under Section 8 and the other under Section 10 of the law above referred to.

It is a part of the duty of the United States Congress to protect the people of this country by suitable legislation against the entrance herein of certain objectionable classes of aliens; and in accordance therewith various Acts have been passed by Congress, among them being the Act of March 3, 1891, for violations of Sections 8 and 10 of which these informations are prosecuted. Among the prohibited classes enumerated in said Act are idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from loathsome or contagious diseases, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, and persons whose passage money has been paid by another or who has been assisted to come here, with certain exceptions as to the last class.

It is provided in said Act that when ships arrive at any port within the United States, having on board alien immigrants, it shall be the duty of the commanding officer and the agent of the steam or sailing vessel, to furnish to the inspection officers, before any of these immigrants are landed, certain manifests, containing the name, nationality, last residence and destination of every such alien. The inspection officers thereupon go or send competent assistants on board such vessel and there inspect such immigrants. The law further provides that "the inspection officers may order a temporary removal of such aliens for examination at a designated time and place and then and there detain them until a thorough inspection is made," and that "such a removal shall not be considered a landing during the pendency of such examination."

Gentlemen of the jury: Under the twelve informations, which were consolidated for the purposes of this trial, it appears that the steamer "Coptic," a vessel plying between the state of California and the empire of Japan, arrived in the port of Honolulu, Territory of Hawaii, on the 18th day of December, 1902, having

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on board, among other Japanese immigrants, the following, to wit:

Yoritaro Nokao, Tekuichi Ueda, Fukutaro Shimada, Nobuchi Kaya, Toyoji Matsuda, Katsura Hokao, Juizaemon Matsuda, Gontaro Matsumoga, Soichi Yoshioka, Komajiro Kurazumi, Jisaburo Muzamoto and Suekichi Mihara. That these immigrants, together with some three hundred and eighty others, being in all three hundred and ninety-two, were removed from said steamer "Coptic" to the Quarantine Station, so-called, for the purposes of inspection and examination.

Gentlemen of the jury: The United States has provided no official place or immigrant station for the detention of immigrants in the Territory of Hawaii, pending an examination or inspection as to their competency to enter into the United States. Such examinations are to be made, to all intents and purposes, on board of the steamships or sailing vessels bringing alien immigrants to this country. But it appears from the facts in this case, that it has been customary, for the convenience of the steamship companies, to remove these alien immigrants to the Quarantine Station for the purpose of avoiding delays in the voyages of these steamships to their terminal points; and that in this instance the same procedure was followed.

These immigrants were examined by the officers of the Marine Hospital Service and were found to be suffering from a contagious eye disease, called trachoma, and a report to that effect was made on the 20th day of December, 1902, to the Immigration Inspector, who thereafter, on the 23rd day of December, 1902, after making an inspection of all of these immigrants, including these twelve Japanese, notified the defendant herein that these twelve Japanese, together with some fifty others, were refused a landing. In the meantime, unknown to the immigration officers, the twelve Japanese referred to in these informations had escaped.

And right here, gentlemen of the jury, I wish to instruct you, that during the trial of this case it was admitted by the defendant that the immigrants came to the United States on the steamship "Coptic;" that the defendant is a corporation, and

the agent of the steamship "Coptic;" that the immigrants were taken to Quarantine Island, and that while on the Island they escaped. By reason of these admissions you are charged that no proof whatever was necessary on the part of the government as to them, and you are to take such facts as established.

It is provided by Section 8 of the Act of March 3, 1891, that:

"It shall be the duty of the aforesaid officers and agents of such vessel, to adopt due precautions to prevent the landing of any alien immigrant at any time or place other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall knowingly or negligently land or permit to land any alien immigrant at any time or place other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor...."

While Section 10 provides in part that:

"All aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in..... And if any master, agent, consignee or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from whence they came.....such master, consignee, agent or owner shall be deemed guilty of a misdemeanor....."

Gentlemen of the jury, I instruct you that you are to be the exclusive judges of the facts in this case; the law you will take from the Court.

In relation to the first count of these informations, I instruct you that from the time of the entrance of the steamer "Coptic" into the harbor of Honolulu, upon the date mentioned in the said informations, until the final completion of the examination of these alien immigrants by the proper inspection officers, the custody of such immigrants remained in the ship, notwithstanding that they may have been removed from the ship for the purposes of such inspection. In the language of the statute, this "temporary removal shall not be considered a landing, pending such examination." It is done, as was shown in these cases,

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for the convenience of the shipping people, and to prevent any delay in the completion of the voyage of such vessel to its terminal point in California. For the purposes of the Act itself, these immigrants are treated as being still on board the vessel, and until they are declared to be lawfully entitled to enter the United States, the responsibility for their safe keeping was and is with the ship, or its agent, under the provisions of the law. They cannot be relieved from the responsibility by claiming or proving that any officer or any employe of the United States may have assumed to look after them.

Therefore, if, pending such examination and inspection, these Japanese, or any one of them, escaped into the territory of the United States, then that was due to the negligent landing of such escaped immigrants, on the part of the defendant at a time and place other than that designated by the inspection officers. And if you should find that such was the fact in any one of the cases prosecuted under these informations, then your verdict must be guilty under the first count or counts of said informations.

Gentlemen of the jury, I instruct you further that you cannot consider any attempt on the part of the defendant to prove due care on its part or the fact that due care was exercised to prevent the escape of any of these immigrants. Under the provisions of the Act of Congress upon which these informations are based, this is no excuse. The steamship company and its agent took the risk when these Japanese immigrants were brought here, that they might be among the prohibited classes and that they might escape and enter the country unlawfully. Nothing will excuse the steamship company or its agent, the defendant in this case, but what is known in law as *ris major* (overwhelming force) or inevitable accident, and neither of these things has been shown in these cases.

Gentlemen of the jury, in reference to the second count of these informations and each of them, I wish to instruct you that it is the law, that after these immigrants had been examined by the proper inspection officers, and a decision adverse to their landing was arrived at, the custody of such immigrants continued

in the steamship company or its agent, and it was the duty of the steamship company or its agent, after notice of the rejection of such immigrants or any one of them, to deport them or any one of them, to the country from whence they came. And if, after rejection by the aforesaid inspection officers, and pending deportation, the immigrants so rejected, or any one of them, escape, then the said steamship company or its agent, is liable under the second count or counts of these informations.

Gentlemen of the jury: You are instructed that in these cases, when the government has established to your satisfaction that these immigrants coming into the United States were rejected by the immigration officers, duly authorized to act in these matters, and the defendant was notified of such rejection, it then became incumbent upon the defendant, as I have before stated, to return such immigrants to the port whence they came, and the law holds the steamship company responsible for the safe keeping of these immigrants, as I have before stated, from the time the ship enters the port of Honolulu with these alien immigrants on board.

Gentlemen of the jury, should the government establish these facts to your satisfaction, then the burden of proof is cast on the defendant to show that such a return was made. As the law has placed the custody of these immigrants in the steamship company or its agents, as I have instructed you, it is not required of the government that it prove that immigrants were not returned. It is a well settled rule of law, even in criminal cases, that the person within whose knowledge the facts are supposed to lie, is required to prove the facts. I therefore instruct you, that if the defendant in these cases has not proven to your satisfaction that these immigrants were returned to the port whence they came, although notified of their rejection by the proper inspection officers, then your verdict should be guilty under the second count of these informations.

Gentlemen of the jury, in arriving at a verdict in these cases, you must pass upon the two counts in each and every informa-

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tion; and your verdict must be by the unanimous assent of all your members.

The District Attorney will provide you with proper forms of verdict.

NAWAIEHA v. WILDER STEAMSHIP COMPANY, a corporation, and PAAUHAU SUGAR PLANTATION COMPANY.

DECIDED: MAY 5, 1903.

1. The master of a ship and a seaman thereon are fellow servants engaged in a common employment both in the navigation of said ship and while engaged in the loading and unloading of her cargo; and each assumes the risk of the other's negligence in the discharge of the duties incident to this common employment.
2. The owner of a steam vessel is not responsible in damages for personal injuries sustained by a seaman through the negligent giving of an unauthorized signal by the master of the ship, whereby a sling load of sugar was allowed to prematurely descend into a boat without warning to the seaman, thus injuring him; where no allegation is made in the libel of neglect on the part of the owner of the vessel in the selection of a proper person as master of the ship, or of any other breach of positive personal duty from which the injury might have resulted.

IN ADMIRALTY. EXCEPTIONS TO LIBEL.

J. J. Dunne, for libellant.

Kinney, McClanahan & Bigelow, for Wilder Steamship Company.

Holmes & Stanley, for Paauhan Sugar Plantation Company.

ESTEE, J. This is a suit in admiralty in *personam* to recover the sum of ten thousand dollars for personal injuries alleged to have been sustained by the libellant while engaged in loading a cargo of sugar into the steamship "Helene," belonging to the defendant, Wilder Steamship Company.

The allegations of the libel are in substance as follows:

That the defendant, the Wilder Steamship Company, is a cor-

poration, organized under the laws of the Territory of Hawaii, and on the 20th day of March, 1903, said corporation was engaged as a common carrier in the transportation and delivery of merchandise in and upon the various steam vessels owned by it, and that among said steam vessels so owned by it was the steam vessel known and designated as "Helene." That the defendant on the said 20th day of March, 1903, and for some time prior thereto was employed as a seaman on board of the aforesaid steamship "Helene."

That the Paauhau Sugar Plantation Company is a corporation, organized under the laws of the state of California, and is doing business within the Territory of Hawaii under the laws thereof; and on the 20th day of March, 1903, was operating a sugar plantation and wharf as part thereof, at Paauhau, on the Island of Hawaii in said Territory; that the sugar produced on said plantation was shipped from said wharf and discharged from said wharf by the said sugar plantation company for transportation elsewhere, into vessels alongside of said wharf and afloat upon the navigable waters of the port or harbor of Paauhau, on the said Island of Hawaii in said territory.

That on the afternoon of March 20, 1903, the steam vessel "Helene" was anchored in the port of Paauhau, some distance away from said wharf, to receive from said Sugar Plantation company from said wharf, certain sugar to be transported elsewhere; that the said steam vessel was not made fast to or connected in any way with the said wharf; that the "Helene" had three large boats and one smaller one, which were intended and used to transport sugar from the shore or wharf to the vessel. That the master of the steam vessel "Helene" ordered the libellant to go with others in one of the larger boats to the wharf and procure from said wharf a cargo of sugar, transport the same to the steam vessel, and then discharge the same into the said steam vessel; that the libellant obeyed the order of said master and went with said boat and crew from the "Helene" to the wharf; that this boat was not at any time made fast to the wharf, but was kept in position by the use of the oars, the surface of the wharf being considerably elevated above the surface of the boat.

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The process of the transferring of said sugar from the wharf to the boat, as shown by the allegations of the libel, was as follows:

"On said wharf there was a derrick, so constructed as to be capable of being swung out over the edge of said wharf so that sugar hoisted thereby would be suspended over the water; attached to the upper end of this derrick was a block and at its heel there was another block, and through these two blocks a wire fall was rove; at one end of this fall was attached a hook used to hoist the sling loads of sugar, while the other end of said fall led to the steam winch which was used to hoist the sugar to the end of the derrick, and thence to lower it into the boat."

It appears further that all of the appliances for the transference of the sugar were the appliances of the Paauhau Sugar Plantation Company, and that the libellant was not employed by the said sugar plantation company in any capacity and had nothing whatever to do with the operations of transferring the said sugar from the said wharf into the said boat; that all of the appliances, gear and machinery for the transferring of the sugar from the wharf to the boat were all upon the wharf of the sugar company, and that none of the same was made fast to the boat in any way; that said machinery, gear and appliances were all operated and managed by employes of the sugar plantation company and not by members of the crew or employes of the "Helene."

It appears further that "when a sling load of sugar was hoisted to the end of the said derrick, said derrick was then trimmed or swung out so that such sling load of sugar would be over the water; it then became the duty of the employe of said sugar plantation company who was in charge of said steam winch to lower said sling load of sugar part way down, and then hold it to await a signal from the crew in the boat; said signal would notify said winchman when to let said sling load of sugar descend into said boat; said winchman was not to drop said sling load of sugar into said boat until he received said signal; and in this behalf, the libellant further shows, that according to the established process of transferring sugar from said wharf to said boat, if said winchman should drop said sling load of sugar into said

boat without or before his reception of said signal, he would be violating his duty in the premises. Upon the proper giving and reception of said signal, but not otherwise, it was the duty of said winchman to drop said sugar into said boat."

It appears further from the libel that on March 20, 1903, the date of the alleged accident, the master of the steam vessel "Helene" was on said wharf at the place where the sugar was being transferred as described in the libel, and at the time of the injury complained of was not in the boat nor did he form any part of the crew thereof; that a sling load of sugar was hoisted to the end of the derrick and the said derrick was so trimmed that the sling load of sugar was suspended partly over the water and partly over the boat, and the crew in the boat were endeavoring to maneuver the boat so as to get it into proper position to receive the sling load of sugar.

That while this was being done by said crew, "but before said crew was ready to receive said sugar, and before any signal of any kind had been given from said boat to said winchman, and without any signal from said boat to said winchman, said master of said steam vessel, without receiving any signal from said boat, suddenly and without any warning or other notice to said crew in said boat and contrary to the aforesaid established method of transferring said sugar, called out to the said winchman to let go said sling load of sugar...."

That the winchman did let go the sling load of sugar suddenly and without any warning or other notice to the crew in the boat, "and contrary to the established method of transferring the said sugar to said boat," and the said sling load of sugar, containing ten bags of sugar, each weighing 125 pounds, descended with great rapidity into the boat.

The libel alleges that the libellant endeavored to avoid the sling load of sugar, but was unable to do so owing to the transaction occurring so quickly; that the sling load of sugar knocked him against another sling load of sugar already in the boat and near the gunwale thereof, struck his left hand and jammed it against the gunwale and "tore and lacerated said hand to such an extent that it has ever since been useless to him."

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It is further alleged in the libel that the injuries were caused by the carelessness and negligence of both the defendants, and especially the carelessness and negligence of the master of the "Helene" in calling out to the winchman to let go the sling load of sugar before the said crew in the boat was ready to receive it, and "before any signal of any kind had been given from said boat to said winchman and without any signal from said boat to said winchman or to said master."

Further, that the accident was due to the carelessness and negligent action of the winchman in letting go the sling load of sugar before the crew in the boat was ready to receive the same and before any signal was given from the boat, and without any signal from said boat to said winchman.

That there was concurring negligence on the part of both defendants in setting in motion carelessly and negligently, the machinery, appliances and gear by which the sling load of sugar was permitted and allowed to descend upon the libellant and injure him as alleged.

That the libellant was confined to the Queen's Hospital, in Honolulu, by reason of this injury, from March 21, 1903, to March 31, 1903, and although discharged from said hospital, the lacerations in the hand are not yet healed, and said libellant is not able to use said hand and since the 20th day of March, 1903, has been totally disabled and his earning capacity destroyed, and that he does not know when, "if at all, his former earning capacity will be restored." That he suffered great mental anguish and physical suffering from the fear that he would lose his hand and thus become unable to earn his livelihood in his profession. The libel further shows the earning capacity of the libellant, as seaman on board of the "Helene" at the time of the alleged accident, to have been seven and 50-100 dollars per week, and that he then was, and for a long time prior thereto had been, in perfect health, enjoying the free use of his limbs.

Damages for all of which is asked for in the sum of \$10,000, together with the amount of wages lost to the libellant by reason of said injury.

Certain exceptions were filed to this libel by the defendant, the Wilder Steamship Company, which makes it necessary to consider whether the allegations of fact set up in the said libel are such as to render the said Wilder Steamship Company liable in this action.

The exceptions are as follows: 1. That the libel sets forth no cause of action against said defendant. 2. That at the time of the alleged injury to the libellant, the master of the "Helene" was not acting within the scope of his employment. 3. That at the time of the alleged injury, the master of the "Helene" was a fellow servant of the libellant in the transaction and work being done. 4. That the alleged negligence of the master of the "Helene" was not the proximate or legal cause of the alleged injury of the libellant. For all of which reasons the Wilder Steamship Company claims it should not be held responsible.

It must be admitted that any one of these exceptions, if well taken, would result in relieving the respondent, the Wilder Steamship Company, of liability. Very able and voluminous briefs have been filed by both counsel for libellant and respondent, covering all of the points raised, but I do not deem it necessary to go further than a consideration of one of them, namely, whether the captain of the "Helene" was a fellow servant of the libellant under the circumstances as set forth in the libel herein.

For the purposes of these exceptions, the allegations of the libel are taken as true.

The negligence for which it is sought to hold the respondent, the Wilder Steamship Company, is the alleged negligence of the captain of the "Helene" in giving an order to the man in charge of the winch on the wharf at Paauhau (an employe of the Paauhau Plantation Company), contrary to the method theretofore established, as alleged in the libel. The allegation being that said method was for the men in the boat when they were ready to receive the sugar, to give the signal, after the sling load of sugar had been suspended over the boat; but that the captain of the "Helene" practically altered this method without any

warning to the men in the boat, by calling out suddenly to the winchman on the wharf to let go the sugar, while he, the captain, was standing on the wharf; and that this was done before the men in the boat were ready to receive the same, and the order being obeyed by the winchman, the injury resulted to libellant.

It is clear from the allegations of the libel, that the libellant and captain of the steamship "Helene" were both employes of the Wilder Steamship Company and engaged in a common employment, that of navigating the ship "Helene," and as a matter of the ordinary business of the ship as a common carrier, loading and unloading her cargo.

Assuming that the accident was due to the negligence of the captain of the "Helene," it does not follow from the circumstances as shown by all the averments of the libel, that the responsibility for said negligence lay with the Wilder Steamship Company, in the absence of any averment showing neglect of positive duty on the part of the owner of the ship, the Wilder Steamship Company.

The positive duty of a master to a servant has been very concisely stated in the case of *Atchison, Topeka & C. Co. v. Moore*, 29 Kas. 632, 644, quoted approvingly in *B. & O. Railroad v. Baugh*, 149 U. S. 368, 387, as follows:

"A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment, or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employes."

There is nothing upon the face of the bill to show that the master of libellant and the captain of the ship, (the Wilder

Steamship Company) had been derelict in any of these positive duties.

The negligence complained of, namely, the giving of the unauthorized and unusual order by the captain, who, it is claimed by libellant, acted as the vice principal of the Wilder Steamship Company, was the negligence of a fellow servant of the libellant, under the rules of law laid down by the recent decisions of the Supreme Court of the United States and by the Circuit Court of Appeals of the Ninth Circuit.

See *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, where the Court says, (quoting from page 384):

"*Prima facie*, all who enter into the employment of a single master are engaged in a common service and are fellow servants, and some other line of demarkation than that of control must exist to destroy the relation of fellow servants. All enter into the service of the same master to further his interests in the one enterprise; each knows, when entering into that service, that there is some risk of injury through the negligence of other employes, and that risk which he knows exists, he assumes in entering into the employment."

New England Railroad Co. v. Conroy, 175 U. S. 323; *Olson v. Oregon Coal & Navigation Co.*, 96 Fed. 109; *Olson v. Oregon Coal & Navigation Co.*, (C. C. A.), 104 Fed. 574.

See also *Quinn v. New Jersey Lighterage Co.*, 23 Fed. 363. In that case, the libellant was injured by the act of the captain of the ship in prematurely setting in motion a winch; and the owners were relieved from all liability on the ground that the act performed by the captain was an act that any other co-servant might have performed, and that the doctrine of non-liability for negligence of fellow servants applied.

However, the controlling case in the mind of the Court, and the rules laid down in which, so far as these exceptions are concerned, this Court is constrained to follow, is the case of *Olson v. Oregon Coal & Navigation Co.*, originally decided by Judge De Haven of the District Court, and reported in 96 Fed. 109, and affirmed by the Circuit Court of Appeals of the Ninth Circuit, and reported in 104 Fed. 674.

There the doctrine of the non-liability of the master for the injury of one fellow servant by the act of another, was squarely applied, when, as in that case, such injury was received by a seaman on board a ship and the negligence which caused the injury is assumed to be that of the master of the ship. The Court there saying (96 Fed. P. 111):

"While it is true the master of a ship is a servant of higher grade than that of a seaman, and represents the owner in respect to the personal duties and obligations which the latter owes to the seaman, still in all matters pertaining to the navigation of the ship the master and seaman are fellow servants, engaged in one common employment, and each assumes the risk of the other's negligence in the discharge of the duties incident to such common employment."

In the same case on appeal, where the decision of Judge De Haven was affirmed, the Circuit Court of Appeals quotes from the case of *New England Railroad Co. v. Conroy*, 175 U. S. 323, on the general doctrine of the non-liability of the master for the negligence of one fellow servant, resulting in the injury of another fellow servant, and also adopts as the law of the case the language of Judge Brown of the Southern District of New York, in the case of the *City of Alexandria*, reported in 17 Fed. 390, where that learned judge says, (P. 392):

"The navigation of a ship from one port to another constitutes one common undertaking or employment, for which all the ship's company, in their several stations, are alike employed. Each is in some way essential to the other in the furtherance of the common object, *viz.*, the prosecution of the voyage."

And I might add further, quoting from the same judge: "Each one, therefore, upon the principles laid down in the common law courts, takes the risk of any negligence in the performance of his duties by any of his associates in the common employment."

Under the allegations of this bill, the libellant and the captain of the steamship "Helene" were engaged in a common employment, both in navigating the said steamship "Helene" and in loading and unloading her cargo, and the negligence of the said

captain, as alleged, was that of a fellow servant of the libellant, for which the defendant, Wilder Steamship Company, cannot be held responsible. The exceptions are sustained, and the bill as to the Wilder Steamship Co. is dismissed.

SAMUEL PALAPALA *v.* PAAUHAU SUGAR PLANTATION COMPANY.

DECIDED: MAY 20, 1903.

1. Where the method used in transferring sugar from a wharf to a boat sustained in position only by its oars in the open sea, was shown to be the following:

The man in charge of the derrick and winch on the landing first suspends the sling load of sugar out over the boat, and there holds it to await a signal from the men in the boat when they are ready to have it lowered into the boat; and it was shown in the special instance complained of, that no signal was given for him to lower the sling load, containing some 1,250 pounds of sugar, into the boat, but that he did so without warning to the men in the boat, thereby severely injuring one of the crew thereof, and the man in charge of the winch claimed that the boat was lifted up on a big wave and struck the under side of the sling of sugar, and that the injury to the member of the crew resulted from that fact, without any negligence on the part of the winch man; *Held*, that if the boat had risen upon the big wave as claimed, and the sailor had been lifted up with the boat and injured, yet the same wave would have carried the boat past the sling load of sugar, which, if held in position by the winchman, would have remained suspended even after its impact with the boat; and the fact that the sling load of sugar did not remain suspended, but remained in the boat on top of the unconscious sailor, shows conclusively to the mind of the court that the winchman had negligently let go his hold of the sling load of sugar.

2. Where it was shown that the winchman had entire control of the winch on the wharf, and was subject to no orders from any one in relation to the lowering of the sling loads of sugar save the signals from the men in the boat when they were ready to receive the same; and where it appeared that the winchman either saw, or, if he looked, could have seen, the incoming waves; *Held*, that by the mere raising or lowering of a lever he could control the position of the sling load, and if the conditions of the accident were such as are claimed by him, it would still have been but the work of a mo-

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ment for him to have raised the sling load out of the way of the wave and the boat, and thus have avoided the accident, if he had exercised such vigilance as was incumbent upon him.

3. The greater the danger, the greater the care required of the winchman in the exercise of his control over the machinery in his charge.
4. A person of ordinary intelligence will not purposely expose himself to danger.
5. The winchman was an employe of the Paauhau Sugar Plantation Company, engaged in the prosecution of its work, and the said company is charged with responsibility for his careless and negligent acts done in the course of his employment and resulting in injury to libellant.

IN ADMIRALTY. LIBEL *in personam* FOR DAMAGES FOR INJURIES.

J. J. Dunne, proctor for libellant.

Holmes & Stanley, proctors for libellee.

ESTEE, J. This is a suit in admiralty *in personam* to recover the sum of \$15,000 for personal injuries sustained by the libellant while engaged in loading a cargo of sugar into the American steamship "Helene."

The facts appear to be these: The libellant is a seaman on board of the steamship "Helene;" the respondent, the Paauhau Sugar Plantation Company, was, at the time of the injury, and now is, a corporation, organized under the laws of the state of California, and engaged in business in the Territory of Hawaii under the laws thereof. The said respondent operates a sugar plantation and wharf at Paauhau, on the Island of Hawaii, and sugar is shipped and discharged from said wharf into vessels afloat upon the navigable waters of the port of Paauhau.

On the afternoon of March 19, 1903, the date of the injury complained of, the "Helene" was anchored in the port of Paauhau to receive from said wharf certain sugar for transportation elsewhere; the Master of said "Helene" ordered libellant to go with certain others of the crew to said wharf to get a load of sugar in one of several large boats belonging to the ship, used for that purpose; the libellant obeyed these orders, and together

with said crew consisting of four men besides himself, namely, Kewiki, Toka, Kia, and Hina, went from the "Helene" to the wharf; that the boat in which they were, was not made fast to the wharf but was kept in position with the oars, the surface of the wharf being considerably elevated above the surface of the boat; said wharf being some twenty-two and one-half feet above sea level.

The process by which the sugar was transferred from the wharf to the boat is admitted to be as follows:

"On said wharf there was a derrick so constructed as to be capable of being swung out over the edge of said wharf so that sugar hoisted thereby would be suspended over the water; attached to the upper end of this derrick was a block and at its heel there was another block, and through these two blocks a wire fall was rove; at one end of this fall was attached a hook used to hoist the sling loads of sugar while the other end of said fall led to the steam winch which was used to hoist the sugar to the end of the derrick."

It appears further that when a sling load of sugar was hoisted to the end of the derrick, the said derrick was then swung out so that such sling load of sugar would be over the water. It then became the duty of the winchman on the wharf, to lower the said slingload of sugar part way down, and then hold it to await a signal from the crew in the boat, that signal notifying the winchman when to let the sugar descend into the boat.

All of the appliances, gear and machinery used in the operation of transferring the sugar belonged to the respondent, with the exception of the rope slings in which the sugar was transferred from the wharf to the boat; these latter belonging to the steamship. But no complaint is made as to these rope slings having been defective or as having contributed to the injury.

The winch was in charge of an employe of the respondent.

On the day of the injury, it seems that a sling load of sugar was hoisted to the end of the derrick and suspended over the water partly over the boat, the crew of which were endeavoring to so maneuver said boat as to place it in a proper position to

receive the said sling load. That while this was being done, said winchman let go the sling load of sugar containing some ten bags of a gross weight of 1250 pounds, which precipitated the sugar suddenly into the boat, thereby striking the libellant, knocking him down, severely bruising him and breaking his collar bone.

The libellant was removed to the "Helene" and from there to the plantation hospital at Paauhau, where he remained for two days and was then taken to the U. S. Division of the Queen's Hospital in Honolulu, where he remained from the 24th day of March, 1903, when the "Helene" reached Honolulu, until the 6th day of May, undergoing treatment for his injuries.

The libellant was at the time of the injury some twenty-one years of age, a strong, healthy man, and earning \$7.50 a week as seaman on board the "Helene." He has been unable to work at his vocation since the injury.

It is claimed by libellant that his injuries were the result of the carelessness and negligence of the respondent, through the negligent act of the winchman who suddenly and without warning let go the sling load of sugar before the crew in the boat had given the signal in accordance with the established method, and before any signal of any kind had been given from the boat, and also by the careless and negligent manner in which the machinery and gear were set in motion by the said winchman.

While the respondent claims that after the slingload of sugar was suspended over the water, the winchman received a signal from the men in the boat to lower the sling load part way down; that he did so and held it there awaiting a further signal to lower the slingload into the boat, when suddenly the boat was lifted up by a big wave towards the sugar, and the libellant was then struck and injured by coming in contact suddenly with the sling of sugar.

The injury is therefore undenied. The cause alone being disputed. The question then presented is, was the accident the result of the negligence of the winchman in letting go the sling load of sugar without notice from the crew in the boat, or was

it the result of a big wave which thrust the boat up towards the suspended sling load of sugar and thus caused the injury to the libellant?

The method pursued as shown by the uncontradicted evidence in this case was for the man in charge of the winch on the wharf at Paauhau, to suspend the sling load of sugar over the boat which was to receive it, and hold it there until he got a signal from the crew in the boat that they were ready for the sugar, when he slowly lowered it into the boat, two of the crew usually "trimming" it, in the technical language used, or steady-ing it gradually into place. This was done both before and after the accident on that day, as both Captain Nicholson of the "Helene" and Westovey, an employe of the respondent in charge of the landing at Paauhau, testified that about one thousand sacks of sugar were delivered aboard the "Helene" on that day, one sling load having been transferred before the accident occurred. Each of these sling loads contains ten sacks of 125 pounds each, or a total of 1250 pounds to the load.

That the business of transferring sugar from the landing at Paauhau to vessels lying out in the open sea is a dangerous one because of the methods employed and the conditions surrounding the transaction, is clear; and especially is this so when the weather is stormy and the sea consequently rough, rendering more than usual care necessary in the handling of the instrumentalities employed.

There seems to be considerable difference of opinion between libellant's witnesses and those of respondent as to just how rough the sea was on the afternoon of March 19, 1903, when the accident occurred. Naka, one of the Japanese employes of the plantation, testified that "the sea was very rough....with high waves, many of which came up on the landing and wet the sugar." It is in evidence uncontradicted, that the height of the landing is 22½ feet above the surface of the water. If the testimony of this witness is correct, taken in connection with the admitted height of the landing above the sea, then the natural inference to be drawn is that these waves must have been at least

22½ feet in height in order to have wet the sugar lying on the wharf.

Captain Nicholson of the "Helene," who stated that "the waves came up on the landing and the sugar got wet," and Westovey in charge of the landing, who said that "the sea was very rough," both unite in testifying that on the afternoon of the accident, notwithstanding these enormous waves, about 1000 sacks of sugar were loaded from the landing into these boats and discharged into the "Helene." This sugar must have been dry. Its commercial value would have been destroyed at least temporarily, if wet with the salt water, or until it had been put through the milling process again, which evidently was not done so far as these 1000 sacks of sugar were concerned; although Westovey testified that if the sugar got wet it had to be taken back to the mill again. It would seem if the waves had been of the character described, none of the sugar on the landing could have escaped a wetting.

The four men in the boat who had been engaged with the libellant in the work of transferring this sugar, and who certainly of all people, should know best about the character of the sea in which they were working, being in an open boat, sustained in position only by the oars, all testified to the fact that while the weather had been rough in the forenoon and possibly somewhat rough in the afternoon, as it was necessary to get out the canvas to cover the sugar to protect it from the salt spray, yet it was calm enough to work in the afternoon.

Hina, one of these boatmen, says: "It had been quite rough in the forenoon; but after lunch it was all right." Kiwiki, another of these men, testified as to the weather on that day, that, "in the morning it was windy and rough, but in the afternoon it calmed down." Toka, also one of the boat's crew, said: "the coast there is not always rough; on that day it was rough in the morning but not in the afternoon; while Kia, the boat steerer, testified "the weather was calm enough for work; it was quite calm in the afternoon....at no time that afternoon did the waves interfere with the loading of the sugar."

It appears that the boat in which these men were working was about twelve or thirteen feet from the rocks on the shore. This was the testimony of Palapala, the libellant, and is uncontested. It would seem apparent that if these waves were running twenty-two and a half feet high, that it would be an impossibility for the men to work in such a sea. The boat would have been in danger of being dashed to pieces on the rocks. This fact seems to render more probable the testimony of the boat's crew as to the comparative smoothness of the sea, as the work was prosecuted both before and after the accident.

The winchman had knowledge that the sea was rough. He testified that the "weather was awful rough that day." He also stated that he "could see many big waves rolling in." He further testified that he suspended the sugar over the boat and while so suspended, that one of these big waves came and lifted up the boat, which struck the sling load of sugar underneath, and the accident resulted. This was practically the testimony of all the respondent's witnesses as to the cause of the accident, most of whom were at a distance; Westovey stating that he was 150 feet away, and Captain Nicholson that he sat on the deck of the "Helene," 350 feet away.

The winchman also testified that after the libellant was injured, he hoisted the sling load of sugar off from the unconscious body of libellant in response to a signal from the boat to do so. This he should have done either with or without a signal, and it is immaterial whether he raised the sling voluntarily or in response to a signal.

Westovey and Naka testify that when the sling struck the libellant he was standing up in the boat with his arms extended. This does not appeal to the common sense of the Court in view of the after effects. If the waves were as high as is insisted upon by the respondent's witnesses and this boat being raised up against the sling load of sugar, it does not seem reasonable to suppose that the libellant would have deliberately placed himself in danger of being struck, but would have instinctively avoided or made some attempt to get out of the way of the danger. Such is the common experience of mankind. The instinct of self-

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preservation is strong in human nature, and stands for proof of care. *Allen v. Willard*, 57 Pa. St., 347; *Cleveland & Pittsburgh R. R. Co. v. Koncan et ux*, 66 Id. 393; *Thomas, Adm'r, etc. v. The Delaware, Lackawanna & Western R. Co.*, 8 Fed. 729, 731. A person of ordinary intelligence will not purposely expose himself to danger. *Cassidy v. Angell, Town Treasurer, etc.*, 12 R. I. 447.

But this testimony of Westovey and Naka is flatly contradicted by the crew in the boat and by Fujimoto, one of the defendant's own witnesses, and who testified that he saw the accident. The testimony of the crew is all to the point that no warning was given of the coming of the sugar, but that Palapala was straightening up after attempting to haul the canvas out from the bottom of the boat to cover the sugar placed there by the first sling load. It appears that this canvas is always carried for the purpose of protecting the sugar from the salt spray and the washing of the waves into the boat while the sugar is being transferred.

The libellant himself says:

"Just before the accident, I was fixing up the canvas to keep the sugar dry from the waves. As I stood up, I was struck. The canvas was not quite out then."

Kia, the steerer, said "that when he was struck, Palapala was on the starboard side of the boat working on this canvas."

Hina testified "that at the time of the accident, Palapala was still working on the first sling load trying to cover it with the canvas. He got no warning that the sling load was coming. We did not expect it to fall."

Kewiki's testimony is to the same effect, while Bob Toka says, "we gave no signal to lower sugar because we had to get the canvas that was under the first sling load. We had to get that canvas out before receiving another sling load."

The winchman testified on the stand that he took his signals for the final lowering of the sugar from the men in the boat, who alone had the right to signal him, and that he took these signals from no other source. He does not claim to have received any signal whatever before the accident, which is in line

with the testimony of libellant's witnesses, but states that the accident was unavoidable in that while the sugar was suspended over the boat awaiting the signal, the big wave came, the boat rose with the wave and struck the sling load of sugar from underneath, resulting in the injury to libellant. It is in proof that after the accident, the sling load of sugar was hoisted up again. Says Hina, "the sugar fell on him at the edge of the boat, and when it was hoisted, he fell into the boat. he lay still, he could not move."

So, too, Kewiki says, "when the sugar struck him he gave a kind of grunt and then fell down in the boat. . . . When the sugar was hoisted off of him he fell from the edge into the bottom of the boat."

It would seem that a necessity existed for the sling to be hoisted, which is very significant. Even if, as contended by respondent, those big waves had actually been running and one of them had lifted up the boat as argued, and the libellant had been lifted up in the boat on this wave and had struck the sling load on the under side and thus had been injured, yet the same wave would have carried the boat past the sling load of sugar, which, if held in position by the winchman, would have remained suspended even after its impact with the boat. But instead of this, we find the sling load of sugar in the boat on top of the unconscious man, showing conclusively to my mind that the winchman had let go his hold of the sugar.

While I am constrained to think from the weight of the evidence, that the weather was not unusually stormy on that afternoon, yet even if there were high seas running these could have been seen by the winchman and he should have seen and guarded against them.

Westovey, who had been in charge of the landing for a little over a month, testified that he was familiar with the winch house; that he had been in there and knew from personal experience that the winchman could see the incoming waves; that he had himself seen them. The winchman stated that the weather was very rough on that day and that "he could see many big waves rolling in."

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As was said by the Supreme Court of the State of California, in the case of *Glascock v. C. P. R. R. Co.*, 73 Cal. 137, 141:

"If he looked, he saw; and having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances."

The winchman had entire control of the winch on the landing and could raise and lower the sling as he pleased. He was subject to orders from no one in relation to the lowering or raising of these slings of sugar, save the signals from the boat's crew when they were ready to receive the same. By the mere raising or lowering of a lever he could control the position of the sling load; and, if the conditions of the accident were as claimed by respondent, it would have been but the work of a moment for the winchman to have raised the sling load out of the way of the boat, and thus have avoided the accident if he had exercised such vigilance as was incumbent upon him.

In the case of *Shumacher v. St. Louis Railway Co.*, 39 Fed. 174, the Court said that—

"The highest duty of man is to protect human life or the person of a human being. That duty is never performed so as to escape responsibility until all possible care under the circumstances is exercised."

In view of all the conditions surrounding the loading of this sugar and with which the winchman was necessarily familiar, the responsibility on his part in prosecuting his portion of the work was made greater. If the danger increased by the stormy condition of the weather, then the greater the care required of the winchman in the exercise of his control over the machinery in his charge.

Says the Supreme Court of the United States in the case of *Mather v. Rillston*, 156 U. S. 391, 398-9—

"* * * where the occupation is attended with danger to life, body or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect from

which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards."

The Anchoria, 113 Fed. 982; *In re California Navigation and Improvement Co.*, 110 Id. 670.

After a careful consideration of all of the testimony in the case, I am of opinion that the injury was not caused by the boat being raised up on a big wave, but that it resulted from the careless and negligent act of the winchman in suddenly lowering the sling load of sugar without warning, and before any signal had been given from the men in the boat.

The winchman was an employe of the respondent, engaged in the prosecution of its work, and as such employe, the respondent is charged with responsibility for his carelessness and negligent acts done in the course of his employment and resulting in the injury to libellant.

The amount of damages to be awarded is usually dependent upon the pain and suffering occasioned by the injury, the age, habits of life, and occupation of the libellant, his ability to earn, and the effect of the injury upon all these things. *Grant v. Union Pacific Railway Co.*, 45 Fed. 673, 683.

The libellant was at the time of the injury twenty-one years of age and a sound, strong healthy man, with so far as the evidence shows, no bad habits. As a result of the accident, his right clavicle, or collar bone, was broken, and he was otherwise severely bruised. He was for two days at the plantation hospital at Paauhau, and then removed to the U. S. Marine Division of the Queen's Hospital, at Honolulu, where he remained undergoing treatment for his injuries until the day before the commencement of this trial, when he was discharged. He is not yet able to work, or to lift any object of any considerable weight, a serious proposition to a man following his vocation, that of a

sailor, in these island waters. While it appears that the bones have knit and that libellant is able to move his shoulder, yet he suffers pain intermittently. Dr. Wood, called for respondent, testified that he examined the libellant on May 6th, some weeks after the injury, and that he found "a united fracture of the right clavicle;" but that the "libellant would not have perfect use of his arm for a considerable time," and that the fractured clavicle is "a permanent injury." He also stated that to be able to perform his work as a sailor, his muscles would have to be trained.

Dr. Cofer, also called for respondent, does not seem to have taken a very active part in the examination of libellant, stating that he looked on at Dr. Wood's examination; but in the main his testimony is corroborative of that of Dr. Wood, admitting, however, that the fractured bone "will never be as it was before." Dr. Humphris, as it appears, examined the libellant on four different occasions and testified that the injury was a very severe one, and stated that he believed the intermittent pain from which the libelalnt is suffering was due to the shoulder joint being in either a neuralgic or tubercular condition, inclining somewhat to the latter. Upon the trial, an examination was made of the libellant by Dr. Wood on behalf of respondent and Dr. Humphris of libellant, and as a result of this examination, a very serious condition was shown to exist. The pulse of the man was then one hundred, or about twenty degrees above the normal, and his temperature indicated one hundred and a half or two degrees of fever. Both doctors united in their testimony as to these facts. Dr. Wood stating that "there was something wrong with the man."

Something evidently must be wrong with libellant; and in view of all the evidence in this case, and especially of the evidence as to the sound, healthy condition of libellant previous to the accident, it is reasonable to suppose that his present condition is due to the injury and resultant therefrom. Dr. Humphris stated that if the pain suffered by libellant in the shoulder joint is neuralgic, that it will be a considerable time before his earning capacity is restored; if the pain is due to a tubercular condition,

often the result of the impact of a heavy body on the surface of a joint, then his capacity to earn his living as before the accident can never be restored. Whether the joint is neuralgic or tubercular, was not made clear from the testimony of these physicians, but it is clear that the condition of said joint is not normal, and that such condition was due to the injury. In any event, it is plain that his present and immediate future earning capacity is totally impaired.

I think libellant is entitled to a judgment, in addition to the amount of wages which he has lost since the date of the accident, in such a sum as will compensate him for the injury and suffering consequent thereon. I will, therefore, award him the sum of three thousand dollars in full of all damages for the injury, and the further sum of \$65.35, being the amount he would have earned as wages between the 19th day of March, 1903, and the date hereof, making a total of \$3,065.35, together with costs of suit.

Let judgment be entered accordingly.

UNITED STATES OF AMERICA *v.* I. MIYAMA.

DATED: MAY 22, 1903.

1. The port of Honolulu is a port of the United States, and the importation of women therein for purposes of prostitution is an importation "into the United States."
2. Not necessary to prove date of offense set up in indictment; if proven to have been committed within three years prior to finding of indictment, the law is satisfied.
3. Where law makes a crime a felony, any attempt to violate the law in that respect is an attempt to "feloniously" commit the specified crime. "Knowingly" to commit a crime is to go about its commission with a knowledge of what one intends to do.
4. A man is presumed to know the result of his acts.
5. A wilful doing, when used in the language of the penal statutes, is the doing with an evil intent, without a reasonable belief that the doing of the act is lawful.
6. In order to sustain a charge of importation of a woman for purposes of prostitution, it must be shown beyond a reasonable doubt that at the time of the importation by the defendant it was his pur-

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- pose that the woman should engage in prostitution in this country.
7. In considering question of intent, jury has right to take into consideration kind of place the woman was taken to on arrival in the country, character of practices engaged in by her, and whether such practices were with knowledge and consent of defendant.
 8. Circumstantial evidence is legal evidence; must be acted upon in the same manner as if direct.
 9. In attempting to prove that a certain house is a house of prostitution, it is permissible to show that it is located among houses having a general reputation of that character; or that it is known in the community as a house of ill fame.
 10. Confessions freely and voluntarily made are evidence of the most satisfactory character.
 11. The government in a criminal case is not bound by the testimony of a witness produced in its behalf, where such testimony is contrary to statements made by such witness out of court to the prosecuting officers of the government, and which statements resulted in the bringing of the charges against the defendant.
 12. While such prior statements cannot be taken as proof of the facts stated, yet it is proper to admit such statements on the trial.

CRIMINAL LAW.

Indictment under Section 3 of
Act of Congress of March 3, 1875,
entitled an "Act supplementary to
the Acts in relation to immigration."

R. W. Breckons, United States District Attorney, for the government.

J. W. Cathcart, for defendant.

CHARGE TO THE JURY.

ESTEE, J. Gentlemen of the jury: The prosecution in this case is based upon an alleged violation of the provisions of Section 3 of the Act of Congress of March 3, 1875, entitled "An Act supplementary to the acts in relation to immigration." (Vol. 1, Supplement to Revised Statutes of the United States, Page 86.)

The indictment contains but one count, which is as follows:

That the defendant did on the eleventh day of June, 1902, "feloniously, knowingly and wilfully import from the empire of

Japan into the United States of America, to-wit: to the port of Honolulu, within the District and Territory of Hawaii, a certain woman, called Itono Miyama, for the purposes of prostitution at the said port of Honolulu."

Gentlemen of the jury, I will read for your instruction, that provision of the law held to be violated, to-wit:

"That the importation of women into the United States for the purposes of prostitution is hereby forbidden; and all contracts and agreements in relation thereto made in advance or in pursuance of such illegal importation and purposes, are hereby declared void; and whoever shall knowingly and wilfully import or cause any importation of women into the United States for the purposes of prostitution, or shall knowingly or wilfully hold or attempt to hold any woman to such purposes in pursuance of such illegal importation and contract or agreement, shall be deemed guilty of a felony....."

The law further providing for a specified penalty upon conviction of any such offense.

Gentlemen of the jury, I instruct you that the port of Honolulu is a port of the United States and is an American port, and the importation of any woman into the port of Honolulu for the purposes of prostitution, is an importation into the United States within the meaning of the law.

You are the exclusive judges of the facts in this case. I will instruct you as to the law bearing upon the testimony offered. And I wish to state to you that a defendant is presumed to be innocent until he is proven guilty; that is, he is considered innocent until your minds are satisfied, beyond a reasonable doubt, that he is guilty. And by a reasonable doubt, gentlemen, I mean such a doubt as leaves your mind in such a state of uncertainty that you cannot arrive at a conviction of guilt.

In considering the evidence before you, gentlemen, you are not to be controlled by the number of witnesses who may have testified on one side or the other; but rather by their credibility and by the conviction which the testimony of any one or more witnesses may convey to your minds of the truth or falsity of the charge made. In this respect, I charge you that the burden of

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proving the truth of the charges against the defendant is on the government, and it must satisfy your minds on that point. But it is not necessary that this charge should be proven as of the actual date set up in the indictment. Under the law, if this offence is proven to have been committed within three years prior to the finding of the indictment, the law is satisfied.

Gentlemen of the jury, the defendant is charged in the language of the indictment, to have "feloniously, knowingly and wilfully" committed the offense named, to-wit: imported into this territory from the empire of Japan, a certain woman, Itono Miyama, for the purpose of prostitution in the city of Honolulu.

I do not think it necessary for me to explain the term prostitution. In the language of the statute which I have heretofore read to you, there can be no mistake as to its meaning. But I do instruct you, that the crime with which the defendant is charged is a felony, and where the law makes a crime a felony, then any attempt to violate the law in that respect is an attempt to "feloniously" commit the specified crime. "Knowingly" to commit a crime is to go about the commission thereof with a knowledge of what one intends to do. A man is presumed to know the result of his acts, and where the indictment alleges a willful doing, it means not alone doing with knowledge and acting as a free agent, but when used in the language of the penal statutes as in this case, it means a doing with an evil intent, without a reasonable belief that the doing of the act is lawful.

I, therefore, instruct you, gentlemen of the jury, that if you believe from the evidence that the defendant herein at the time stated in the said indictment, or within three years before the finding of the same, brought into this territory from the empire of Japan, the woman, Itono Miyama, knowingly and wilfully and feloniously intending to use that woman for purposes of prostitution, and that the said woman did enter upon the practices of a prostitute with the knowledge and consent of the defendant, then I instruct you that the said defendant has committed a felony under the law, and you should find him guilty as charged.

It is charged in the indictment that the woman was imported

for the purpose of prostitution within the United States. In order to sustain the charge that the purpose of importation was that of prostitution, it is necessary that the government should establish to your minds, beyond a reasonable doubt, as defined in these instructions, that at the time of the importation by the defendant of the woman, Itono Miyama, it was the purpose of the defendant that the woman should engage in prostitution in this country.

As bearing on the question of intent, you have a right to take into consideration the kind of place to which the defendant took the woman upon her arrival in this country; you have further the right to take into consideration the kind of practices in which the evidence may show the woman engaged, and whether such practices were indulged in by her with the knowledge and consent of the defendant.

Certain circumstantial evidence was introduced in this case; indeed, the main facts were attempted to be proven by the government by circumstantial evidence. In this behalf, I instruct you that circumstantial evidence is legal evidence; and when evidence of that character satisfies you beyond a reasonable doubt of the truth thereof, you are bound to act upon it in the same way as if it were direct evidence. It is almost impossible in this class of cases to obtain direct evidence. The law, therefore, permits the best testimony obtainable. For instance, in attempting to prove that a certain house was or is a house of prostitution, it is permissible to show that it is located among houses having a general reputation of that character, or that it is known in the community as a house of ill fame. In a word, that it has the general reputation of being a house of prostitution and proof of its general reputation in the place where it is situated is introduced. Or, in attempting to prove that this woman is a prostitute, certain circumstances may be shown, among them being the fact that she lives among prostitutes or people having the general reputation of being prostitutes; that she has no respectable pursuit in life, or that she lives in a house having the general reputation of a house of prostitution.

Gentlemen of the jury, the witness, Geffeney, called for the

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government, testified that the defendant stated to the witness that the woman, Itono Miyama, practiced prostitution in the Territory of Hawaii with the knowledge and consent of the defendant.

You are instructed that a confession if freely and voluntarily made, is evidence of the most satisfactory character; it is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt and, therefore, it is admitted as proof of the crime to which it refers; and in this case, if you believe from the evidence that the statements alleged to have been made by the defendant to the witness, Geffeney, were in fact made, and were freely and voluntarily made, then I charge you that such statements are evidence of the most satisfactory character that the woman, Itono Miyama, was in fact practicing prostitution within the Territory of Hawaii, with the knowledge and consent of the defendant. *Hopt v. People of Utah*, 110 U. S. 574.

The woman, Itono Miyama, who is alleged to have been brought into this territory for the purposes of prostitution, was introduced as a witness by the government, but when called upon to testify stated that she was not a prostitute and had not been brought to the United States for the purposes of prostitution. Thereupon the District Attorney was permitted to prove that the witness, Itono Miyama, made a statement pending the investigation, which resulted in the bringing of this action, to the effect that she had been brought to the United States for the purpose of prostitution by the defendant and had engaged in the practice of prostitution for the benefit of the defendant while in the United States. While the statement thus made by her to the officers in such investigation cannot be taken as proof of the facts stated by her, nevertheless the admission of such testimony was proper. The witness having made such a statement to the officers, the government was justified in believing that the witness would so state in Court, and I charge you that the government is not bound by the statements of witnesses made in Court contrary to the statements made out of Court.

In conclusion, gentlemen of the jury, I instruct you again,

that you are the judges of the truth or falsity of all testimony offered in the case as you are the sole judges of the facts.

I instruct you further that it is the duty of the United States officers to see that the laws thereof are enforced, and their acts legally performed in attempting to bring before the Courts for trial those parties whom they deem to be violators of the law, are in the line of their duty and they should not be criticized for performing that duty.

It will require the unanimous assent of all your members to arrive at a verdict in this case. The United States District Attorney will furnish you with forms of verdict.

Note: To same effect see case of *U. S. v. Hirota*, dated April 25, 1903, not reported.

FREDERICK V. BERGER *v.* E. FAXON BISHOP.

DECIDED: JUNE 22, 1903.

1. The decision of the Board of Special Inquiry provided for by the Act of March 3, 1903, giving certain alien immigrants the right to land in the Territory of Hawaii, is not a bar to an action to recover the penalty for the unlawful bringing of said alien immigrants into the country, under Sections 4 and 5 of the Act of March 3, 1903, regulating the immigration of aliens into the United States (Vol. 32, Part 1, U. S. Stats., 1213).
2. Review of immigration laws of the United States supplementary to Sections 2158-2164, R. S. U. S.
3. The provisions of Section 914, R. S. U. S., are not mandatory upon this court; on the contrary, a discretion is left in the court as to whether it will follow technically the forms, pleadings and modes of procedure of the courts of the territory.
4. In an action at law based upon the provisions of Sections 4 and 5 of the Act of Congress of March 3, 1903, entitled "An Act to regulate the immigration of aliens into the United States" (Vol. 32, Part 1, p. 1213, U. S. Stats.), where defendant pleaded as a bar to the action the decision of a board of special inquiry provided for by Section 25 of the Act, admitting the alien claimed to have been brought into the country in violation of Sections 4 and 5 thereof, Held, that Congress provided a tribunal for the recovery of the penalty sued for in "the courts of the United States," and further pro-

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vided that "both the Circuit and District Courts should be invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act" (Section 29). No restraint was placed upon the judgment of the courts by reason of the previous action of the administrative branch of the government. The question at issue between the alien and the government in that special inquiry was simply one of the alien's right to land.

5. A plea in estoppel does no more than deny the plaintiff's legal right to bring the action without denying or admitting the allegations of the complaint.
6. The plea in bar, so-called, in this case held to be a plea in estoppel, which is overruled and defendant given 5 days in which to plead further.

AT LAW.

{ Action to recover penalty under Sections 4 and 5 of Act of March 3, 1903. (Vol. 32, Part 1. P. 1213, U. S. Stats.)

Thayer & Hemenway and *John Albert Mattheicman*, for plaintiff.

Smith & Lewis and *Hartwell & Bigelow*, for defendant.

ESTEE, J. This is an action at law brought by the plaintiff under the provisions of Sections 4 and 5 of an Act of Congress, dated March 3, 1903, entitled "An Act to regulate the immigration of aliens into the United States." (U. S. Statutes, 1902-3, page 1213).

The complaint alleges that—

"Continuously from November 1, 1902, or thereabouts, up to May 1, 1903, the defendant did knowingly encourage and solicit the migration and importation into the United States of America from a foreign country, to-wit: the empire of Korea, of one John Doe 1st, a foreigner and an alien, being a Korean to perform labor and service in the Territory of Hawaii; that in pursuance of and after such encouragement and solicitation, the defendant continuously, between March 3, 1903 and May 1, 1903, did knowingly assist the immigration and importation of said alien into the said United States of America from the Empire of Korea and on or about April 1, 1903, did

knowingly prepay or cause to be prepaid, the transportation of said alien between the countries aforesaid, and that in pursuance of such encouragement and solicitation, said alien did migrate, and on May 1, 1903, did enter said Territory of Hawaii; that after entering said Territory of Hawaii as aforesaid, said alien did perform labor and services therein."

The defendant interposed a plea in bar so-called duly verified by the oath of defendant, which is in words and figures following:

"The defendant says that on the 5th day of May, A. D. 1903, at Honolulu, in the Territory of Hawaii, a duly appointed Board of Special Inquiry appointed in conformity with the provisions of an Act of Congress approved March 3, 1903, entitled 'An Act to regulate the immigration of aliens into the United States,' was convened to consider amongst other cases, the case of the lawfulness of the immigration and importation to the United States of America, to wit: to Honolulu, in the Territory of Hawaii, from a foreign country, to-wit, the Empire of Korea, of one 'John Doe 1st', a foreigner and an alien, being a Korean, and being the same person mentioned as an alien in the plaintiff's complaint.

"That said Board then and there had full authority to determine whether the said alien should be allowed to land or be deported, and also whether said alien had been imported or brought or had come to the Territory of Hawaii in violation of law, and after taking testimony and examining the said case and considering the same, the said board decided on the sixth day of May, that the said alien should be allowed to land and should not be deported. And that said decision is now in full force and effect and is final and conclusive upon the question of the lawfulness of the alleged immigration and importation of the said alien to the United States, and this the defendant is ready to verify. And the defendant says that by force and effect of said decision and of the statute in such case made and provided, the plaintiff is precluded and barred from bringing this action, inasmuch as his right to recover herein depends upon the

unlawfulness of the immigration and importation as aforesaid of the said alien."

Said plea closing with a prayer for judgment that the said complaint be dismissed with costs.

To this, the plaintiff "waiving none of his objections to the legal insufficiency of the defendant's plea", replied as follows:

"Admits (a) that a board purporting to be a Board of Special Inquiry was convened on or about May 5th, 1903, to consider amongst other cases, the case of the importation and immigration of the John Doe 1st, referred to in both the complaint and plea in bar, and further (b) that said Board decided, on or about May 6th, 1903, that said alien should be allowed to land."

But denies every other allegation in the plea contained, concluding with "and of this the plaintiff puts himself upon the country."

Upon these pleadings, the case as to the plea in bar referred to, was heard upon consent without a jury. The defendant introduced both written and oral evidence to sustain his plea; the plaintiff put in no evidence, and the case was therefore submitted upon the evidence offered by the defendant alone and the questions of law raised thereon.

Congress has provided by a series of laws supplementary to Sections 2158-2164 inclusive of the Revised Statutes of the United States, a system, the intent of which is to keep from our shores an undesirable alien population. It was early found that some prohibitory measures were necessary to be adopted in this behalf, to prevent the country becoming flooded with alien immigrants suffering from mental, physical and moral ailments. In the earlier Acts of Congress, the proscribed classes were somewhat limited. The Act of March 3, 1875, (Vol. 13, Part 3, U. S. Statutes at Large P. 477) provided only for the exclusion of "persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their im-

migration, and women ‘imported for the purposes of prostitution.’”

The Act of August 3 1882, (Vol. 22 U. S. Statutes at Large, p. 214), went a little further and refused admission to “any lunatic, idiot or person unable to take care of himself or herself without becoming a public charge.”

The Act of February 26, 1885 (Vol. 23, U. S. Statutes at Large, p. 332), was the original “Contract Labor” Act, prohibiting the importation and immigration of aliens under contract or agreement to perform labor in the United States, and providing a penalty for any person found guilty of violating any of the provisions of that Act by “knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens into the United States. to perform labor or service of any kind under contract or agreement, express or implied, parole or special with such alien or aliens. previous to becoming residents or citizens of the United States.”

This law was amended by Act of Congress of February 23rd, 1887 (Vol. 24, U. S. Statutes at Large, p. 414), by adding thereto certain other provisions whereby the Secretary of the Treasury was given power to make rules and regulations for carrying out the provisions of the Act, and containing certain other provisions not necessary to be gone into.

The Act of October 19, 1888, (Vol. 25, U. S. Statutes at Large, p. 565), also in amendment of the Act of February 23, 1887, authorized the Secretary of the Treasury in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of the law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came.

The Act of March 3, 1891, (Vol. 26, U. S. Statutes at Large, p. 1084), adds to the list of prohibited classes “Paupers. persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude (other than political offenses) polygamists and also any person whose ticket or passage is paid for with the money of another

or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the Act of February 26, 1885."

It was in this Act of 1891 that the first reference to a "special inquiry" was made. It should be here noted as indicative of the strong and consistent feeling of Congress upon the question of contract labor so called, and the determined effort made to meet every phase of these immigration violations, that Section 3 of the Act of 1891, above referred to, provided that "it shall be deemed a violation thereof," to "assist or encourage the importation or immigration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such advertisement shall be treated as coming under a contract as contemplated by such Act....." The same provisions are re-enacted in the Act of March 3, 1903, the penalty being the same imposed by Section 5 of the Act.

The next step taken by Congress in relation to immigration was the Act of March 3, 1893, (Vol. 27, U. S. Statutes at Large, p. 569), which amended the Act of 1891 in some details not relevant to the question under discussion in the case at bar, but which did not add to the proscribed aliens, but provided certain machinery to carry out the provisions of the Act in the nature of a Board of Special Inquiry (Section 5) in conformity to Section 1 of the Act of 1891, which Board was to be conducted by not less "than four officials acting as inspectors, to be designated in writing by the Secretary of the Treasury or the Superintendent of Immigration, for conducting special inquiries. This section provided that no immigrant should be admitted unless upon a favorable decision made "by at least three" of the said inspectors; any decision to admit, however, being subject to appeal by any dissenting inspector to the Superintendent of Immigration whose action was subject to review by the Secretary of the Treasury.

The Act of August 18, 1894, (Vol. 2, U. S. Supp. R. S. U. S., p. 253), provided in relation to the decision of the appropriate immigration or customs officers that such decision, "if adverse to the admission of the alien" should be final unless reversed on appeal to the Secretary of the Treasury.

The Acts of March 2, 1895, (Vol. 2, U. S. Supp. R. S. U. S., p. 415) and June 6, 1900, (Vol. 31, U. S. Statutes at Large, p. 611), respectively provided that the Superintendent of Immigration shall be designated Commissioner General of Immigration and shall be in charge of the Chinese Exclusion Laws and of the various Acts regulating immigration into the United States, its territories and the district of Columbia under the supervision and direction of the Secretary of the Treasury.

The Act of March 3, 1903, (Statutes of 1902-3, p. 1213-1222) upon which this action is based, not alone excludes by its provisions the classes mentioned in the preceding enumerated Acts of Congress, but goes even further in its effort to raise the standard of foreign immigration and to make stronger if possible, the restrictions imposed upon the admission of those undesirable alien immigrants who seek an entrance into the country. It provides by Section 1 thereof for the exclusion of "all idiots, insane persons, epileptics, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers, persons likely to become a public charge; professional beggars, persons afflicted with a loathsome or with a dangerous contagious disease, persons who have been convicted of a felony or other crime or misdemeanor involving moral turpitude; polygamists, anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials; prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution; those who have been, within one year, from the date of the application for admission to the United States, deported as being under offers, solicitations, promises or agreements to perform labor or service of some kind therein; and also any person

Sections 4 and 5 of this Act contain provisions similar to the provisions of Sections 1 and 3 of the Act of February 26, 1885, (23 Stats. P. 332), sometimes called the "assisted immigration act", but a careful reading of these provisions will show a much more comprehensive treatment of the subject of assisted immigrants in the Act of March 3, 1903.

Section 4 provides: "It shall be unlawful for any person, company, partnership or corporation, in any manner whatsoever to prepay the transportation or in any way to assist or encourage the importation or immigration of any alien into the United States in pursuance of any offer, solicitation, promise or agreement, parole or special, express or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled in the United States."

I do not deem it necessary at this stage of the case, however, to enter into a construction of Sections 4 and 5 of this Act, save possibly as to the right of the plaintiff to institute this action, which I will recur to later.

Under the Act of March 3, 1893, Section 5 thereof, special inquiries are to be held relative to the case of any alien detained by an immigration inspector, who is not satisfied "clearly

and beyond a doubt" that the alien is entitled to admission; an appeal being allowed to the Superintendent of Immigration by any dissenting inspector from the Board's decision to admit, with a final review by the Secretary of the Treasury.

The Act of March 3, 1903, Section 25, also provides for the appointment of Special Boards of Inquiry; such appointments to be made by "the Commissioner of Immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of aliens detained at such ports under the provisions of law."

The "detention" referred to is a detention doubtless arising under the provisions of Section 24 of said Act, which provides that "every alien who may not appear to the immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land, shall be detained for examination in relation thereto by a Board of Special Inquiry"; which is practically the same provision as in the Act of March 3, 1893; but Section 25 of this last Act goes further and is more stringent than is the analogous provision of the Act of 1893, for it provides that although an alien may be permitted to land upon examination and favorable decision by an immigrant inspector, yet that such decision shall be "subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged, before a board of special inquiry for its investigation."

This Board of Special Inquiry shall "consist of three members" (Section 25) selected from such of the immigration officials in the service as the Commissioner General of Immigration with the approval of the Secretary of the Treasury, shall from time to time designate as qualified to serve on such boards. Under this Section, such Boards are given "authority to determine whether an alien shall be allowed to land or be deported."

The decision of this Board is declared by Section 10 of the Act to be "final as to the rejection of aliens afflicted with a loathsome or with a dangerous contagious disease, or with any mental or physical disability which would bring such alien with-

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in any of the excluded classes", but which decision must "be based upon the certificate of the examining medical officers."

With the exception of these classes referred to, all other aliens whose right to land is denied by the Board of Special Inquiry, the decision of two members of which shall in the language of the Act "prevail and be final", have a right of appeal through the Commissioner of Immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of the Treasury, whose decision shall then be final. (Section 25.)

The right of appeal is also given to any dissenting member of the Board in the same manner, a right also secured under the Act of 1893.

I have gone very fully into a consideration of the provisions of the Acts of Congress in order to ascertain the intent of Congress generally in restraining certain classes of alien immigrants from coming into the United States, and especially that class of immigrants induced to come here under contract or promise of labor. I cannot express more clearly the motive for the original Act of February 26th, 1885, than was stated by Mr. Justice Brown, when, sitting as a District Judge, he decided the case of *United States v. Craig*, 28 Fed. P. 795, an action to recover a penalty under the provisions of that Act. He said—

"The motives and history of the Act are matters of common knowledge. It had become the practice for large capitalists of this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of assisted immigrants. The evil finally became so flagrant that an appeal was made to Congress for the passage of the Act in question, the design of which was to discountenance the migration of those who had not sufficient

means in their own hands or those of their friends, to pay their passage."

Church of the Holy Trinity v. U. S., 143 U. S., P. 457; *U. S. v. Gay*, 95 Fed. 226.

It seems to be clear, not alone that the intent of Congress was to exclude this as well as other classes of undesirable "alien immigrants", but that it designed to leave the final decision as to their "right to land" in the United States, to the discretion of the immigration officials, with a right of final appeal to the Secretary of the Treasury. Congress had plenary power to do this. *Nishimura Ekiu v. U. S.*, 142 U. S., 651, 660; *Hilton v. Merritt*, 110 U. S. 97; *Benson v. McMahan*, 127 U. S. 457; *In re Oteiaea*, 136 U. S. 330; *Lee Moon Sing v. U. S.*, 158 U. S. 538, 547; *Yamataya v. Fisher*, Vol. 23, Ad. Sheets, Am. L. R. No. 12, May 15, 1903.

Counsel for plaintiff contends that defendant failed to prove that the Board of Special Inquiry which considered the cases of the Koreans was a legal board, or constituted under conformity to the provisions of Section 25 of the Act of March 3, 1903. The legality of the organization of that Board is not a matter necessary to be passed upon by this Court in rendering a decision in a proceeding of this character.

It seems to be settled law that the power to admit or reject aliens claiming the right to land in United States territory lies in the administrative officers acting under the political powers of the Government, "except so far as the judicial department is authorized by treaty or by statute, or is required by the Constitution to intervene." *Fok Yung Wo v. U. S.*, 185 U. S. 296. Under the Act of March 3, 1903, this power has been granted by Congress to a special board of inquiry.

But while Congress has seen fit to give full powers to executive officers upon this question, not alone of admitting but of expelling aliens (Sections 21 and 35 Act of March 3, 1903), yet in the exercise of its powers "it may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country may depend." *Lee Moon Sing v. United States*, 158 U. S. 538, 545.

Congress knowing of the strong efforts made to bring into the country this low grade immigration labor, and feeling that there had been and might be in the future many successful evasions of the vigilance of the immigration officers (*In re Liferi*, 52 Fed. 293) substantially provided by Section 5 of the Act of March 3, 1903, that every person in the United States should be constituted a committee of one to ascertain if the immigration laws had been violated in this respect, and as an inducement to due vigilance thereunder, provided that such person could bring an action in his own name "and for his own benefit" to recover from the person accused of violating the law the sum of one thousand dollars as a penalty for each and every such offense. Congress provided a tribunal for the recovery of such penalty "in the Courts of the United States" (Section 5 of the Act) and further prescribed that "both the Circuit and District Courts should be invested with full and concurrent jurisdiction of all causes civil and criminal arising under any of the provisions of this Act" (Section 29). No restraint is placed upon the judgment of the courts by reason of the previous action of the administrative branch of the government. The question at issue between the alien and the government in that special inquiry was simply one of the alien's right to land.

Under the analogous provisions of the Act of February 26th, 1885, as amended by the Act of March 3, 1891, (Section 13) both the Circuit and District Courts of the United States are given jurisdiction of "all causes civil and criminal arising under the provisions of this Act." Under those provisions the Circuit and District Courts of the various Districts of the United States have assumed jurisdiction in suits to recover these penalties for alleged violations of the law. See *U. S. v. Craig*, 28 Fed. Rep. 795; *U. S. v. Bornemann*, 41 Fed. Rep. 751; *U. S. v. Edgar*, 45 Fed. Rep. 44; *U. S. v. Gay*, 80 Fed. Rep. 254; *Id.* 95 Fed. Rep. 227; *Rosenberg v. Union Iron Works*, 109 Fed. Rep. 844; *U. S. v. McElroy*, 115 Fed. Rep. 252.

Under the Act of March 3, 1903, as under the former Act of February 26, 1885, the United States as well as any private individual may be a party in suits to recover this penalty; the

late law differing in this, that the private individual bringing the action may do so in his own name "and for his own benefit" thereby making a somewhat radical change from the Act of 1885.

So too, the Supreme Court of the United States in construing Section 13 of the Act of March 3, 1891, amendatory of the Act of February 26th, 1885, and identical with Section 29 of the present Act, says:

"Section 13, by which the Circuit and District Courts of the United States are 'invested with full and concurrent jurisdiction of all causes civil and criminal arising under any of the provisions of this Act', evidently refers to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under Sections 3 and 4 (of the Act of 1885) or indictments for misdemeanors under Sections 6, 8 and 10. Its intention was to invest concurrent jurisdiction of such causes in the Circuit and District Courts; and it is impossible to construe it as giving to the courts jurisdiction to determine matters which the Act has expressly committed to the final determination of executive officers." *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 664.

I am of opinion that this Court has jurisdiction to hear actions arising under Sections 4 and 5 of the Act of March 3, 1903; and the decision of the Board of Special Inquiry giving to these Koreans the right to land, is not a bar to an action for a penalty for bringing them unlawfully into the United States brought under the said provisions of that Act. *U. S. ex rel Anderson v. Burke*, 99 Fed. 895, 900.

Counsel for plaintiff made the point that if this court should overrule the plea in bar of defendant, judgment should be at once entered against the defendant for the amount of the penalty sued for upon the ground that the plea in bar is a confession and avoidance under the rules of common law pleading; and that having had a full trial upon the facts presented by him under said plea, defendant cannot under the provisions of Section 1223 of the Civil Code of Hawaii, (Civil Laws of Hawaiian Islands, 1897) continued in force by the provisions of an Act of Con-

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gress for the government of the Territory of Hawaii (U. S. Stats. Vol 31, p. 141) plead any further. Counsel contended further that this court is bound under the provisions of Section 914 of the Revised Statutes of the United States to conform to the practise, pleadings and forms and modes of proceedings of the courts of the Territory of Hawaii. Under the local practise, two forms of answer are provided by Section 1223 of the Civil Code of Hawaii: 1. "Admitting all the facts stated in the petition to be true and denying that they are sufficient in law to support the plaintiff's demand, which shall form an issue of law to be determined by the court; or, 2, Denying the truth of the facts stated in the petition, which shall form an issue of fact to be determined by the jury." And concluding "that after either of these answers there shall be no further pleading."

The first form of answer called for under this Section is practically a demurrer, and in fact Section 1229 of the Civil Laws of 1897 of Hawaii, provides that it shall be called a demurrer. It is admitted that no demurrer was filed in this case. The other answer called for "must deny the truth of the facts stated in the petition, which shall form an issue of fact to be determined by the jury." No such denial was interposed in this case by the so-called plea in bar.

The provisions of Section 914 of the Revised Statutes of the United States are not mandatory upon this Court; on the contrary, a discretion is left in the Court as to whether it will follow technically the forms, pleading and modes of procedure of the courts of the territory. Says the Supreme Court in the case of *Indianapolis & St. Louis Railroad v. Horst*, 93 U. S. 291, 300, 301.

"The conformity is required to be 'as near as may be'—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such statutes which, in their judgment would unwisely encum-

ber the administration of the law, or tend to defeat the ends of justice in their tribunals."

And again, in the case of *Mexican Central Railway v. Pinckney*, 149 U. S. 194, 207, the Supreme Court further says:

"The words of this Section 'as near as may be' were intended to qualify what would otherwise have been a mandatory provision, and have the effect to leave the Federal courts some degree of discretion in conforming entirely to the state procedure. These words imply that in certain cases it would not be practicable, without injustice or inconvenience to conform literally to the entire practise prescribed for its own courts by a state in which Federal courts might be sitting."

Association v. Barry, 131 U. S. 100; *Nudd v. Burrows*, 91 U. S. 426; *Erstein v. Rothchild*, 22 Fed. 61, 64; *O'Connell v. Reed et al.*, 56 Fed. 531.

In any event, it may be doubted whether the plea interposed in this case was in conformity with the provisions of Section 1223 of the Civil Laws of Hawaii. I am not inclined, however, to hold with plaintiff that this is such a plea in bar as is considered at common law a confession and avoidance; but it is rather in the nature of a plea in estoppel which neither admits nor denies, but simply relies upon some matter which estops the plaintiff from pursuing his action.

"A special plea in bar alleging matter of estoppel neither confesses nor denies the truth of the declaration, though like other pleas in bar, it virtually denies the right of action by denying the plaintiff's right to allege the facts stated in the declaration." Section 70, Gould on Pleading, 4th Ed. Ch. VI Part 2, p. 317.

Says the same author, on Page 33 of the same work, Chapter 2, Section 39,—

"A plea to the action being an answer to the merits of the complaint, always goes in denial of the alleged right of action. And this the defendant may deny, 1, by denying in whole or in part, the allegations in the declaration; or 2, by alleging new matter which admits the truth of the plaintiff's allegations, but goes in avoidance of them; or 3, by pleading matter which

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neither admitting nor denying any of the facts alleged by the plaintiff, denies his legal right to allege them."

It seems to the court that this plea in bar is a plea in estoppel which does no more than deny the plaintiff's "legal right" to bring this action by setting up as a bar thereto, the decision of the Special Board of Inquiry. No judgment will be entered in this case until all the facts are heard by the court on the merits. The plea in bar is therefore overruled with costs taxed against defendant; the defendant being further given five days' time in which to plead.

SINGURD LANGAAS *v.* THE BARKENTINE "JAMES TUFT," her apparel, tackle, etc.

DECIDED: JULY 2, 1903.

1. In an action in admiralty *in rem* for damages for injuries sustained by a seaman on board the barkentine "James Tuft," where it appears that said seaman was thrown down on the deck by heavy seas and caught under a spar lashed amidships, which spar rose and fell upon the seaman, breaking his thigh bone; it being claimed by him that the injury was due to the improper placing of said spar on said ship and in the insecure lashing of the same, and where it was shown to be customary to place such spars on board sailing vessels to be used in case of emergencies; *Held*, that while there was some doubt as to whether this spar was properly placed or securely lashed to the deck, yet in the absence of any allegation or proof of either incompetency among the officers, or of neglect in providing the usual number of men required to man the vessel, or of unseaworthiness in any particular, the accident was the result of the perils of navigation, and resulted from the risks incident to libellant's employment, for which the vessel is not liable.
2. The fact that the master of the vessel was a part owner therein, held not material in the absence of any evidence of such negligence as would entitle the libellant to damages for the injury primarily done him.
3. The maritime law is sensitive as to the rights of seamen and rigorous in providing for their protection. When injured in the service of the ship, or disabled by illness while in such service, they are entitled to be cared for, and cured if possible, at the expense of the vessel; and where that duty is not performed, and a seaman suf-

fers from the neglect, the ship is liable in consequential damages for the suffering and pain caused by such failure.

4. Where on a voyage from Newcastle, in the Colony of Australia, to Honolulu, in the Territory of Hawaii, a seaman on board the "James Tuft" was seriously injured by having his thigh broken, and on the twelfth day after such accident the vessel was within sixty miles of Papeete, on the Island of Tahiti, a well-known and settled French colony, where it was reasonable to suppose medical and surgical aid were obtainable for the injured man, but the Captain of the vessel failed to put into such port, proceeding instead on his voyage to Honolulu, which he reached nearly three weeks thereafter, and where he placed the injured man in the U. S. Marine Division of the Queen's Hospital, the seaman being confined in said hospital since that time for a period of nine and one-half months, undergoing two severe surgical operations on the injured leg, and being shown at the trial to be a cripple unable to walk without the aid of a cane, which condition is due, according to the testimony of a leading physician, to the bone being allowed to go without proper surgical treatment;

Held, that the master of the vessel was guilty of gross negligence in failing to take libellant to the nearest port, which in this instance was Papeete, on the Island of Tahiti, for surgical aid after he had been wounded in the service of the ship, for which negligence libellant has an additional and different cause of action against the vessel, which is liable in consequential damages.

5. Where an injured seaman was left at a hospital in the city of Honolulu, the vessel on which he was injured proceeding on her voyage and not returning to the port of Honolulu until nine and a half months thereafter, the seaman during all of that time being confined in the hospital undergoing treatment for his injuries, *Held*, that an action instituted by him immediately upon the return of said vessel was in sufficient time and no laches is shown.

IN ADMIRALTY. LIBEL *in rem* FOR DAMAGES FOR PERSONAL INJURIES.

T. McCants Stewart, proctor for libellant.

Robertson & Wilder, proctors for respondent.

ESTEE, J. This is a libel in admiralty *in rem* filed on behalf of a seaman on board the barkentine "James Tuft", for damages in the sum of ten thousand dollars for personal injuries sustained on board said barkentine, through the alleged negligence of the master thereof. The complaint also asks for general relief. The facts appear to be these: On the 16th

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day of July, 1902, the libellant shipped on board the said barkentine for a voyage from Newcastle in the Colony of Australia to Honolulu in the Territory of Hawaii, leaving Newcastle about the 19th day of July, of said year; said vessel was in charge of and managed and controlled by one August Friedberg, acting as master thereof, and who was a part owner in said vessel to the extent of a thirty-second interest therein.

Before leaving Newcastle, a yard spar and also one other spar were placed aboard the vessel and lashed amidships. Afterwards and before the accident occurred one of these spars was moved forward while the other remained in the original position. Some eighteen days out from Newcastle, the libellant was ordered to "tighten up the weather braces of the mainyard and to make square the yard." He was standing near the rail preparatory to doing this, and was working at the braces, when a heavy sea washed over the rail, threw him down on the deck and this yard spar lifted up by the heavy sea came down on the foot of libellant, when another sea coming, he was thrown further under the spar which came down heavily on his knee, and finally falling on the thigh of the libellant broke it, causing in the technical language of Dr. Cooper, a medical expert introduced by libellant, "a fracture of the upper third of the femur of the right leg."

Libellant was pulled out from under the spar and taken to the forecastle first, where rude splints were made ready and his limb set by the Captain with what little knowledge he had. He was afterwards removed to the cabin of the second mate and a box was made in which to place the limb so that in the words of the libellant "it would not roll." There libellant remained until the vessel reached Honolulu some thirty two days later when he was taken to the United States Marine Division of the Queen's Hospital where he has continued to remain for the period of nine months and a half, not yet being discharged from said hospital. During this period of time, he has undergone two severe surgical operations, after one of which he remained in bed six weeks, and after the second operation three months, both being necessitated by the condition of the thigh, as a result

of the injury. The Captain of the vessel after paying the libellant what he deemed the balance of wages due him for the voyage and placing him in this hospital, left Honolulu and sailed for Puget Sound and did not return to Honolulu until at or about the time of the commencement of these proceedings, having been on one other voyage since the accident and having no one of the original crew with him excepting his present first mate. The libellant as a result of the accident is a cripple walking with great difficulty and even then only with the aid of a cane. The right leg is deformed and fully three inches shorter than the other one.

When the accident occurred, the vessel was 1700 miles from Newcastle, 770 miles from Auckland and 1500 miles from the Island of Tahiti. On the twelfth day out after the accident occurred, the vessel was within sixty miles of Tahiti and enjoying fine weather. They were at this time nearly three weeks' sailing distance away from Honolulu, as it took nineteen days to reach this port.

It is not claimed that libellant contributed at all to his injury. Under the pleadings and proof in this case, two questions are presented. First, as to whether the injury to libellant was due in the first instance to the negligence of the captain of the vessel by the improper placing and insecure lashing of the spars, a part of the apparel of the vessel, for which negligence the owner is liable; and second, as to the neglect of the captain of the vessel after the injury occurred to libellant, in not putting in to the nearest port on the Island of Tahiti for surgical aid for him.

Among the duties which the owner of a vessel owes to its crew, are to see that the vessel is seaworthy in all particulars; that it is provided with all the necessary appliances for the safety of the ship and of the men; that the ship is properly manned and provided with proper food supplies; and further that in case of sickness or injury of any member of the crew, that he shall be given proper care and medical attendance. For a failure in the performance of any one of these duties, the owner of the ship is liable.

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I do not think under the evidence produced in this case, that there has been shown any neglect of any of these positive duties on the part of the owner of the barkentine, except the last, that requiring proper care and medical attendance. There is no allegation or proof of any incompetency among the officers; no allegation or proof of any neglect in providing the usual number of men required to man the vessel, and none of any unseaworthiness in any particular. It is true these spars were placed aboard the vessel at Newcastle, but it appears from the weight of the evidence that it is usual and customary to place spars of the character described on board sailing vessels to be used in case of emergencies. There is some doubt in my mind as to whether these spars were properly fastened or securely lashed to the decks. The libellant testified that on the day before the accident occurred one of these spars had been moved forward, and that by such removal the center lashings of the remaining spar were taken off, which spar was then only fastened at either end by lashings secured to ring bolts attached to the main and after hatches, leaving the center loose. This testimony is contradicted by that of the captain and the present first officer of the ship, both of whom claim that the fact that the spar raised as far as the lashings would allow it was due to the heavy seas and the slackening of the rope occasioned by the constant wetting. It is common knowledge that water will cause rope to stretch. The weather had been bad and on the day of the accident was very stormy with high seas, which swept the deck. The ship had 1800 tons of coal on board while its measurement was only 1000 tons. The vessel was therefore loaded to her full capacity. I do not feel at all certain as to there being any negligence on the part of the captain or other officers of the ship in respect to causing the injury. I am inclined to believe that the accident was the result of the perils of navigation, and resulted from one of the risks incident to libellant's employment for which the vessel is not liable.

In the case of the *City of Alexandria*, 17 Fed. 390, in an action for damages for injuries sustained by a seaman who, in endeavoring to obey an order, fell down an open hatchway,

and who claimed his injuries were due to the negligence of the ship's officers, the Court held:

"Whatever negligence there was,—whether in leaving the hatches uncovered or in not notifying the libellant as he went down,—was negligence on the part of those on board the ship and in no way traceable to the owners themselves. It was neglect of the officers or men aboard in the performance of their ordinary duties; a neglect against which the owners could not possibly guard. The navigation of a ship from one port to another constitutes one common undertaking or employment, for which all the ship's company in their several stations are alike employed. Each is in some way essential to the other in furtherance of the common object, *viz*: the prosecution of the voyage. Each one, therefore, upon the principles laid down in the common law courts, takes the risk of any negligence in the performance of his duties by any of his associates in the common employment."

Olson v. Oregon Coal & Navigation Co., 96 Fed. 109; *Id.* 104 Fed. C. C. A. 292.

In this latter case, both in the District Court and upon appeal to the Circuit Court of Appeals, it was held, "That while it is true the master of a ship is a servant of a higher grade than that of a seaman, and represents the owner in respect to the personal duties and obligations which the latter owes to the seaman, still in all matters pertaining to the navigation of the ship, the master and the seaman are fellow servants engaged in one common employment and each assumes the risk of the other's negligence in the discharge of the duties incident to such common employment."

Gabrielson v. Waydell, 135 N. Y. 1; *Scarf v. Metcalf*, 107 N. Y. 211; *Loughlan v. State*, 105 N. Y. 159; *City of Norwalk*, 55 Fed. 98.

It may be that some qualification of this rule should be made, where, as in this case, the master is a part owner of the vessel, but I do not deem it necessary to discuss that point, as it is not in any view decisive of the case, believing as I do that there was

no such negligence shown as would entitle the libellant to damages for the injury primarily done him.

But whatever I may hold as to the failure of libellant to sustain his claim for damages against the ship by reason of the negligence of the ship's officers in causing the injury, which was not made clear, there is no doubt whatever but what he is entitled to damages for the gross negligence of the captain in failing to put into the nearest port at the time of the injury or as soon thereafter as it was possible to do so, to get proper surgical aid for this man. This was the positive duty of the captain of the vessel, irrespective of any sacrifice of time or risk to cargo, "it was a burden which the law imposes." *Brown v. Overton*, 1 Sprague 462, Fed Case No. 2024; *The Iroquois*, 113 Fed. 964; *Whitney v. Olson*, 108 Fed. 292; *The Troy*, 121 Fed 901.

The maritime law is sensitive as to the rights of seamen and rigorous in providing for their protection. When injured in the service of the ship, or disabled by illness while in such service, they are entitled to be cared for and cured if possible at the expense of the vessel; and where that duty is not performed and the seaman suffers from the neglect, the ship is liable in damages for the suffering and pain caused by such failure. *Couch v. Steel*, 77 Eng. Com. L. 402; *Brown v. Overton*, 1 Sprague, 462; Fed Cases No. 2024; *Tomlinson v. Hewett*, 2 Saw. 278; *Whitney v. Olson*, 108 Fed. 292; *The Troop*, 118 Fed. 769.

But what are the uncontradicted facts in this case? The captain admits the injury; he knew the man's thigh was broken; he admits that he attempted to set it. He must have known of the dangerous probabilities that might ensue through lack of proper surgical attendance therefor. Even if the thigh had been set properly it would be almost impossible for the bones to knit on ship board owing to the constant movement of the vessel. The captain testified that at the time of the accident, "the ship was in latitude 44-55 south; longitude 168-30 w. which would be from Auckland approximately 770 miles." That they were some 1500 miles from Tahiti, and "1700 miles from Newcastle." It may be true that it was too rough and stormy, as he stated, to go back to Auckland or to Newcastle, but the Island of Tahiti

was directly in the line of this vessel's voyage, and on the twelfth day after the injury, the vessel was, as testified to by Captain Friedberg, within "60 miles of the Island of Tahiti," and they were then enjoying what he calls "fine weather." The libellant all this time was lying in his berth with his leg encased in a wooden box, subject to further injury by the shaking up, due to the constant movement of the vessel. Honolulu was over two thousand miles away, but no attempt was made by the captain to make this near port of Tahiti although he had still before him a three weeks sail to Hawaii. Papeete, on the Island of Tahiti, a well known and settled French colony, was within a few hours' run of his vessel, where it was reasonably certain he could have obtained surgical attention for this injured man. It is common knowledge that there are many medical men, and both civil and naval surgeons, at Papeete, which is the commercial emporium for the products of the South Sea Islands. (See *Annuaire de Tahiti* of 1892, a government publication). Yet in defiance of the established rules of the maritime law and the commonest dictates of humanity, the captain of this vessel instead chooses to carry this maimed seaman on through these tropic seas for nearly three weeks longer deprived of the medical attention which he was entitled to have under the law, and which was practically within his reach. The fact that libellant did not complain or insist upon his rights in this particular, can make no difference as to what the duty of the captain of the ship was in the premises. *The Iroquois*, 113 Fed. 964.

Thirty-two days after the injury the ship reached the port of Honolulu, where libellant was taken ashore and placed in the United States Marine Division of the Queen's Hospital where he has lain ever since suffering from this injury, and from the pain incident to two severe surgical operations upon the injured leg, which have kept him confined in that hospital for nine months and a half, nearly five months of that time lying in bed, unable to walk or do anything to help himself.

The leg is deformed and three inches shorter than the other leg, and libellant is permanently disabled thereby from following his chosen vocation of a seaman, for he is deprived of the

power of free locomotion, walking only with great difficulty and then only with the aid of a cane. According to Dr. Cooper, a well known and reputable surgeon of Honolulu, introduced as an expert witness, he is permanently injured, although there is a possibility that by undergoing still another surgical operation, the deformity of the leg might be decreased a little and the leg rendered more serviceable, but which operation would cost something like \$500. But the cause of the present condition of the leg, in the language of Dr. Cooper, is due to "the bone being allowed to go without proper surgical treatment."

It seems reasonable to suppose that if the captain of this ship had done his duty and taken libellant into Papeete on the Island of Tahiti, he might have been saved the present hopeless condition of his leg, and have been able to have had such treatment as would have enabled him to use the leg in his work as a sailor. In any event, he would have been spared some of the suffering and pain which he has endured for the past eleven months since the injury occurred.

There is no contradiction of the fact that libellant was a strong, hardy seafaring man of twenty-three when he signed aboard this ship. He is now so far as his vocation goes, a physical wreck. He has no education which would aid him in doing work other than manual, and he is now deprived of the power to do the latter, at least along the lines he had chosen and which brought him an adequate return. He was earning from twenty to thirty dollars a month as an able-bodied seaman; some twenty dollars a month while in the services of the vessel on which he was injured.

I am forced to believe that his present condition is due to the neglect and misconduct of the captain of the barkentine in failing to take libellant after he had been wounded in the service of the ship, to the nearest port for medical aid. For this neglect, libellant has an additional and different cause of action against the vessel, because a legal obligation to him had arisen to afford him suitable care and nursing. In the absence of this, the ship is liable in consequential damages. *The City of Alexandria*, 17 Fed. 390. It is competent for this Court, under the prayer

for general relief in the libel, to afford him such damages. *The Troy*, 121 Fed. 901.

There has been no laches on the part of libellant in bringing this suit. The vessel has been without this jurisdiction since the libellant was brought therein, and he has been in the hospital ever since. As soon as this vessel returned to this port, libellant instituted his action, which is within due time. *The Slingsby*, 116 Fed. 227.

I do not think that the sum of \$2500 is an unreasonable amount to allow libellant in full of all damages of every kind in view of all the circumstances of this case; and that sum is allowed him, together with costs of suit.

Let judgment be entered accordingly.

SAMUEL GOURLEY AND REDMOND P. DORAN *v.*
MATSON NAVIGATION COMPANY, a corporation.

DECIDED: JULY 25, 1903.

1. Upon the trial of a libel *in personam* against the owner of a steam vessel for wages due libellants and for damages for breach of contract, where it appeared that libellants had been engaged by one Baker, acting as the agent of the defendant for this transaction alone, to go from Honolulu to Hilo to take charge of the steam vessel "Counselman" and bring her down to Hilo as captain and first officer respectively, but upon arriving at Hilo, where the vessel lay, one Guard, the agent of the defendant in charge of the vessel there, refused to recognize the employment of the libellants in the capacities indicated, or at all; Held, that under the facts as shown in this case, the employment of the libellants was within the scope of the authority of Baker; that the contract was for libellants to go to Hilo and bring the "Counselman" to Honolulu; and upon the failure of the defendant to carry out its part of the contract through the action of its agent at Hilo, a right of action accrued to libellants to recover damages for such breach.
2. It is a well-known principle of the admiralty law that when a seaman is discharged before the commencement of the voyage, he is entitled not alone to his wages, but to a reasonable measure of damages, for which the owners of the ship are liable.
3. Claims for wages are very highly favored by courts of admiralty; and discharges, unless for more serious reasons than appear from the facts in this case, are not to be justified.

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IN ADMIRALTY. LIBEL *in personam* FOR WAGES AND DAMAGES
FOR BREACH OF CONTRACT.*J. J. Dunn*, attorney for libellants.*Holmes & Stanley*, attorneys for defendant.

ESTEE, J. This is a libel *in personam* for wages due to libellants from the corporation defendant and for damages for breach of the contract between defendant and libellants.

The facts appear to be these: The owner of the steam vessel "Charles Counselman" wanted to run her over from Hilo, on the Island of Hawaii, to Honolulu, on the Island of Oahu, a distance of some two hundred and twenty-nine miles, to place said steam vessel on the ways for repairs, and she had to be properly officered for that purpose. Mr. Guard, the agent of the defendant at Hilo, wrote from there to Mr. Baker in Honolulu, directing him to hire for him an assistant engineer and a first officer who would have proper papers to take the vessel down to Honolulu. Mr. Baker, on the eighth of June, engaged Captain Redmond P. Doran to act as the first officer of said vessel, and agreed to send him over to Hilo on the "Kinau," leaving on the 9th. On the morning of the 9th of June, Captain Doran said to Mr. Baker, that as Captain Petersen, then in command of the "Counselman," was not a member of the Masters' and Pilots' Association that he did not think he could sail under him as first officer. Whereupon, Baker told him to get someone else to go with him as first officer and he could go as captain. Gourley, the other libellant, was found and agreed to go. Baker testified that he engaged Doran to act as the captain of the "Counselman" on the contemplated trip and Gourley as mate for the same trip. He paid their passage to Hilo on the "Kinau."

When libellants reached Hilo, Guard said that he did not wish a captain; that he could get a mate in five minutes, which he proceeded to do, and refused to consider the libellants as engaged to make the run to Honolulu for that trip. Libellants then took passage on the "Kinau," returning to Honolulu, each guaranteeing to pay the transportation of \$12.50 apiece and passage was granted them on those terms through the courtesy of the

Wilder Steamship Co., as they would otherwise have been stranded at Hilo, some two hundred odd miles from their home port. When they reached Honolulu, on the 13th of June, they went to Mr. Baker for their pay; he said he would write to Guard. They waited for the return mail from Hilo on the 20th, when they were informed by Baker that he could not pay them and that they would have to wait to get the decision of Mr. Matson, the president of the defendant, to whom the matter had been referred. They waited, and on the 29th of June they were finally told that the company would not make any settlement with them, and this suit was instituted.

Mr. Baker testified at the trial, that Captain Doran told him that Captain Petersen, then in charge of the "Counselman," was not a member of the Masters' and Pilots' Association and he could not take the position of mate under him. Captain Parker and Captain Seike, who were present at the time, both said that Captain Petersen was not a member of the Association referred to. "I requested," said Baker, "that he, Captain Doran, go and get some other person who had a mate's papers to go up with him and bring the vessel down. I did that because the Inter-Island telegraph was not working that day, and so I could not communicate with Hilo. I had received advices to telegraph Mr. Guard of the sailing of the 'Kinau,' and advise him, Guard, of the sailing of the men to bring the ship down."

- "Q. By the Court: So you engaged them both?
- A. Yes; I wrote Guard on June 9th.
- Q. By the Court: They knew then?
- A. Yes.
- Q. The men went at your request?
- A. Yes.
- Q. To bring the ship from Hilo to this port?
- A. From Hilo.
- Q. They had no other engagement than to bring the ship from Hilo?
- A. Just the voyage from Hilo to Honolulu.
- Q. By Judge Stanley: Had you at any of the times men-

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tioned in the libel, any connection with the Matson Navigation Company, except in the hiring of these men for the company?

A. No, sir."

So he further testified in reply to a question by Mr. Dunne:

"Q. You said you employed both Doran and Gourley?

A. Yes.

Q. As I understand it, you employed both of them after you learned that if Captain Doran went as mate there might be trouble with the Association on account of Captain Petersen not being a member of the Masters' and Pilots' Association—is that correct?

A. Yes.

Q. Then it was that you employed both of them, that is correct?

A. That is correct.

Q. You employed Doran as master and Mr. Gourley as mate?

A. Yes."

It seems perfectly clear to the Court that Mr. Baker hired Doran and Gourley in the capacities claimed by them. He knew that a man had to have a license from the United States to act as captain or mate of any steam vessel plying between these islands, and he was informed by both Captains Parker and Seike that the captain of the "Counselman" was not a member of the Association, and so he thought he would send two licensed men over to bring this vessel down. There was doubtless some misunderstanding between Gourley and Baker, but Baker evidently thought he was acting within his discretion when he did this. In fact, Guard had written him, "You are to have full charge of the boat; telegraph me when the men will be here." Defendant's Exhibit 2.

The law is not very technical in the matter of the hiring of seamen to serve on short voyages on vessels engaged in the coasting trade, and I am compelled to believe from all the circumstances of the case, that Mr. Baker was acting within the scope of his powers when he engaged libellants in this case; and that they were, therefore, wrongfully discharged by Guard, the agent of the company at Hilo. Claims for wages are very highly

favored in courts of admiralty and discharges unless for more serious reasons than appear from the facts in this case, are not to be justified. *The Idlehour*, 63 Fed. 108.

These libellants went over to Hilo in good faith and they were ready and willing to go to work on the "Counselman" in their respective capacities of captain and mate for the purpose of bringing the "Counselman" from Hilo to Honolulu. This was the character of the contract into which they entered; and upon the failure on the part of defendant to carry out its part of said contract, through the actions of its agent at Hilo, a right of action accrued to libellants to recover damages for such breach. *Pierce v. Tennessee Coal & Railroad Co.*, 173 U. S. 1, 15.

It is a well known principle of the admiralty law, that when a seaman is discharged before the commencement of the voyage, he is entitled not alone to his wages, but to a reasonable measure of damages for which the owners of the ship are liable. *Hindman v. Shaw*, 2 Pet. Adm. 264, Fed. Case No. 6514; *Hart v. Littlejohn*, 1 Pet. Adm 115, Fed. Case No. 6153; *Woolf v. Oder*, 2 Pet. Adm. 261, Fed. Case No. 18,027; *The Ocean Spray*, 4 Sawy. 105.

It appears from the facts in this case that the time consumed by the libellants in going from Honolulu to Hilo, in pursuance of this contract and return to Honolulu was five days. Under the contract, Doran was to be paid at the rate of \$150 a month, or \$5 a day, and Gourley at \$90 a month, or \$3 a day, the regular Association wages for master and first officer of vessels. I, therefore, allow Doran \$25 and Gourley \$15 for the amount which would have been actually paid them if the contract had been fulfilled. Each of said libellants has made himself responsible for the cost of transportation from Hilo to Honolulu, at the rate of \$12.50 apiece. I will allow each of them that amount in addition to the \$25 and \$15 respectively.

As was said by the Supreme Court of the United States in the case of *U. S. v. Bader*, 110 U. S. 338—

"Unless there is some artificial rule which has taken the place of natural justice in relation to the measure of damages, it would

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seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures."

In addition to the foregoing, I will allow each of the libellants the sum of twenty dollars in full of all damages for the delay in the settlement of their just claims against the defendant corporation, which delay was utterly unreasonable under the circumstances of this case. I shall allow nothing for room rent or board during the period after the arrival of the libellants in Honolulu and the institution of this suit. To Doran, therefore, the full sum of \$57.50 is allowed; to Gourley, the full sum of \$47.50; together with costs of suit.

Let a decree be entered in accordance herewith.

1.

IN THE MATTER OF THE APPLICATION OF LEE
CHEE HING FOR AND ON BEHALF OF JUNG
HUNG, for a writ of *habeas corpus*.

DECIDED: AUGUST 1, 1903.

1. In an application for a writ of *habeas corpus* made and signed by a Chinese person on behalf of a Chinese woman, where the allegations of the petition show that the woman is forcibly detained in a house belonging to the respondent, and restrained therein through fear of him, and compelled by him to lead a life of prostitution; *Held*, that the allegations of the petition are sufficient to give the court jurisdiction under Subdivision 3 of Section 753 of the Revised Statutes of the United States, "or in custody in violation of the Constitution," in that such allegations show that she is held in involuntary servitude contrary to the Thirteenth Article of the Amendments to the Constitution of the United States.
2. Where the petition in an application for a writ of *habeas corpus* was not signed by the party "for whose relief it was intended," but by a third person in her behalf, *Held*, that while it is true United States Courts are controlled by the provisions of the Habeas Corpus Act which confers the power to issue the writ upon such courts, yet this court will not give such a narrow construction to the Act as would prevent any person like the woman claimed to be restrained of her liberty in this case, from enjoying the benefits of the Act, who is by the very circumstances of her restraint deprived of the opportunity of signing the application in her own behalf.

3. Section 760 of the Revised Statutes of the United States contemplates the possibility that some third party might make the application for the writ on behalf of the person restrained or deprived of his or her liberty; and said Section must be considered in connection with Section 754.
4. Every person under the Constitution and laws of the United States is entitled to the enjoyment of personal liberty; of the right of free locomotion to go when and where one pleases, and to do all that is necessary in the conduct of one's affairs, restrained only so far as one infringes upon the rights or the welfare of others.
5. No form of slavery or involuntary servitude, except as a punishment for crime, can, under Article Thirteen of the Amendments to the Constitution of the United States, be lawfully permitted to exist in this territory.
6. A Chinese woman shown to have been purchased of her mother in China for \$200, and afterwards brought to Hawaii and compelled by the respondent to lead the life of a prostitute, turning all the earnings of such vocation over to him, and who was (while not physically restrained by respondent, in such fear of him by reason of threats against her life should she go out freely) unable to leave the house where he detained her, found by the court to be restrained of her liberty and held in a condition of slavery repugnant to the Thirteenth Article of the Amendments to the Constitution of the United States, and released on *habeas corpus*.
7. Even if a marriage had existed between the respondent and the woman held under restraint by him, which does not appear to be proven from the facts as shown in this case, still such marriage would give respondent no right to deprive the woman of her personal liberty, and if so deprived, she could have recourse to the writ of *habeas corpus* for release.
8. It is settled law that a husband cannot detain his wife against her will.
9. Liberty may be restrained by threats as well as by forcible action, if the power exists to enforce the threats.

HABEAS CORPUS.

E. A. Douthitt, for petitioner.

C. W. Ashford, for respondent.

ESTEE, J. This is an application for a writ of *habeas corpus* filed herein on the 22nd day of July, 1903, by one Lai Chee Hing on behalf of a Chinese woman, one Jung Hung. The petition alleges that the woman is illegally confined and restrained of her liberty by one Jue Gun, who is not the husband of the

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said Chinese woman or in any way related to her, but that the said Jue Gun forcibly detains the said Jung Hung in a house on Liliha street, in the city of Honolulu, Island of Oahu, Territory of Hawaii, without any claim or authority whatsoever; that the said woman is so kept in said house by the said Jue Gun for the purposes of prostitution and is compelled to live an infamous and immoral life and is restrained in said house through fear of the said Jue Gun.

That the petitioner is engaged to the said Jung Hung and desires her release so that he may marry her and proceed with her to China; that he does not remove the woman from said house for the reason that he might suffer bodily harm if he should attempt to do so. The writ was issued directed to the said Jue Gun, and made returnable on the 23rd day of July, 1903, at 10 o'clock a. m. before the Court. In response to the prayer of the petition it was further ordered by the Court that the United States Marshal take the said Jung Hung from the custody of the said Jue Gun and convey her to a proper place for safe keeping, pending the return of the writ. The woman was taken by the marshal and placed in the custody of Warden Henry of the Oahu prison.

A return duly filed by the respondent, Jue Gun, denies the unlawful detention or restraint of the woman; alleges a marriage with the woman in the empire of China on the 9th day of July, 1893, according to Chinese custom, and that she has ever since been his lawful wife; that he brought her soon after said marriage to Hawaii and has continuously resided and cohabited with her as his wife ever since, there being three children as the result of said union, a daughter nine years old now in China, a son three years old and a daughter two years old. The respondent denies that he has compelled Jung Hung to live a life of prostitution, denies that she has at any time practiced prostitution with his knowledge or consent, asserts a belief in the virtue of his alleged wife, and says that while petitioner for the writ has been a frequent visitor at his house for several years past, he knew of the marital relations existing between respondent and Jung Hung; finally prays for the dismissal of the petition and denial of the writ.

I will first dispose of the question of jurisdiction raised for the first time after the hearing in respondent's brief.

Chapter Thirteen, P. 142, 144 of the Revised Statutes of the United States (2nd Ed., 1878), treats of the subject of *habeas corpus* and the authority and procedure of the United States Courts in the matter of the issuance of such writs.

By Section 753 authority is granted to the Federal Courts to issue such writs as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

It is claimed by respondent that this court has no jurisdiction in this case under the foregoing section, and further that it is also without jurisdiction under the provisions of Section 754 of the Revised Statutes which requires that—

"Applications for writs of *habeas corpus* shall be made..... by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained..... The facts set forth in the complaint shall be verified by the oath of the person making the application."

The point made being that the petition in this case, while verified by the party making the application was signed by a third party and not signed by "the person for whose relief it was intended."

There is some weight possibly in the latter contention. But I find upon an examination of the authorities a number of decisions under the original judiciary act of September 24, 1789, where the applications were made by third parties and jurisdiction sustained. It is true that the statute at that time contained no such provision as is now embodied in the Revised Statutes, and which provision was prescribed by the amendment of February 5th, 1867. There are, however, cases under the present statute, in which, while not deciding the point squarely, the Federal Courts have entertained the applications of third parties. *In re Hoyle*, Fed. Case No. 6803 (1879); 9 Am. Law, Rec. 65; *Thomas v. Winne*, 122 Fed. 395 C. C. A.; *Ex parte Reaves*, 121 Fed. 848; *Mahon v. Justice*, 127 U. S. 700.

While it is true the United States Courts are controlled by the provisions of the Act which confers the power to issue the writ upon them, yet I would hesitate to give such a narrow construction to the Act as would prevent any person, like the woman claimed to be restrained of her liberty in this case, from enjoying the benefits of the Act, who is by the very circumstances of her restraint deprived of the opportunity of signing the application in her own behalf.

Upon an examination of the Statute (Chapter 13, R. S. U. S.), Section 760 thereof must be considered in connection with Section 754, and throws some little light on the subject. It seems plain that the possibility was evidently there contemplated that some third party might make the application on behalf of the party restrained or deprived of his or her liberty. Note the language of the Section—"the petitioner or the party imprisoned or restrained, may deny any of the facts that may be material in the case."

I think I may safely hold that this point is not well taken, and that a sensible construction of these sections of the statute, will more effectually carry out the legislative intention and "avoid an unjust or an absurd conclusion." *Lau Ow Beu v. U. S.*, 44 U. S. 47, 59; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 461.

I am of opinion that the allegations of the petition would be sufficient to give this court jurisdiction under the third subdivision of Section 753 "or in custody in violation of the constitution....."

It is prescribed by the thirteenth article of the amendments to the Constitution of the United States that—

"Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

The allegations of the petition are to the effect that this Chinese woman was forcibly detained and confined in the house of respondent in the City of Honolulu and restrained therein through fear of the respondent and by him compelled to lead an immoral and shameful life, a life of prostitution of her body.

The Supreme Court of the United States in the case of *U. S. v. Wong Kim Ark*, 169 U. S. 649, (quoting from page 677), said:

"Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbid any other kind of slavery now or hereafter."

See also the case of *In re Sah Quah* reported in 31 Fed. 327, where the U. S. District Court of Alaska held that a custom or rite prevailing among the uncivilized tribes of Indians in Alaska whereby slaves are bought and sold and held in servitude against their free will, was contrary to the thirteenth amendment to the Constitution of the United States and the "Civil Rights Bill" of 1866, and a person so held in slavery was released by the order of the court on *habeas corpus*.

Finally in conclusion on this question of jurisdiction, I cannot hold with counsel for respondent that if this court decides that it has jurisdiction in this case, it will "intrench upon the jurisdiction and authority of the territorial courts."

While I do not question the fact that the territorial courts would have had jurisdiction to hear the application for the writ in this case, if their jurisdiction had been invoked in the first instance, yet the petitioner having failed to make his application

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in the courts of the territory and those courts not having refused to issue the writ there is no reason why this court having first been applied to for relief, should not under all the facts of the case dispose of the matter. *Buck v. Colbath*, 3 Wall. (U. S.) 334; *In re Cheticood*, 165 U. S. 443.

This case is somewhat unusual, both because of the charges alleged and of the conflict of the testimony as to the facts in relation to the character of the restraint imposed upon the woman, Jung Hung.

It seems to be an admitted fact that under Chinese customs and laws, a traffic is permitted in women and young girls by means of which young girls especially are bought of their parents for stipulated sums, the girls so sold to be used for unlawful and immoral purposes. I am inclined to believe that this proceeding is the result of a transaction of that character.

The respondent alleges as a defense to the proceeding that he was married to the woman Jung Hung in the Empire of China in 1893; that he returned to China from the Hawaiian Islands and he and the said woman were married according to Chinese customs and had ever since cohabited as husband and wife. Respondent introduced in evidence certain small slips of red paper with Chinese characters inscribed thereon, one of which appeared to be when translated into English, the horoscope so-called of a girl, giving her age, name, day and date of birth, etc.; the other an alleged marriage certificate between the parties wherein it appears that "the sum of \$200 has per agreement been paid over to the mother of Lew Shee, who duly acknowledged the receipt of the same." Lew Shee is claimed to be the name of the woman Jung Hung.

These papers were quite new and crisp looking for certificates that were alleged to have been written ten years ago, and were entirely unlike certain exhibits introduced by the petitioner as forms of marriage certificates or articles used by people in the same class as respondent and being possessed of the means he testified to having at that time, some seven or eight thousand dollars. He admitted that he gave to the mother of the girl whom he claimed to have married some \$200; and testified that

while it was not usual to give money for a wife, yet that Chinese returning to China from foreign countries often did it and that was why he did it.

The woman disclaims utterly any marriage between them; she testified that respondent came to China from Hawaii some eight years ago, and bought her from her mother as his concubine; that he paid her mother \$250 for her; that there were no marriage articles, no marriage ceremony; that she was bought by him to do business as a prostitute and that when he paid the money to her mother, they went down immediately aboard the steamer. That this was done in Hongkong; while Jue Gun says the marriage took place in Canton. The woman further testified that when they reached Hawaii he made her say she was his wife and as soon as she arrived here, compelled her to be a prostitute and that she has been a prostitute ever since, giving him the result of her earnings as such prostitute.

Li Ching, a witness on behalf of petitioner and a well known Chinese citizen, the official interpreter of the courts of the territory, upon being examined in relation to the so-called marriage certificate introduced by respondent, testified that he had never seen such a marriage certificate before; that it was not the custom among the Chinese to use that sort of a certificate. He further testified that he never heard of a man giving a sum of money as a present on the occasion of the marriage to the parents; that the gifts usually consisted of cakes; but that if a man desires to take a woman as a concubine, sometimes then a sum of money is stipulated for between the parties. He further testified that a man can with the consent of the parents buy a woman for bondage by putting up so much money.

While there is a discrepancy in the amounts testified to as passing between the parties, yet it is admitted by all parties that a sum of money was paid by the respondent to the mother of the woman, when she passed into his possession. The respondent, Jue Gun, when asked by the court "how much money did you give for this woman?" answered "\$200."

I do not think a marriage has been proven; but rather in

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the opinion of the court a purchase and sale of this woman as a concubine, for purposes of prostitution.

But even if a marriage had been proven to exist between the parties, that fact would give respondent no right to deprive the woman of her personal liberty, and if so restrained she could have recourse to the writ of *habeas corpus*, for relief. *Wales v. Whitney*, 114 U. S. 564, 571.

It is settled law that a husband cannot detain his wife against her will. In a very recent case decided in 1891, entitled *Reg v. Jackson*, 1 Q. B. 671, where a wife refused to live with her husband, it was held that he had no right to compel her to do so by imprisonment or confinement and she may be released from such confinement or imprisonment by *habeas corpus*. See also *People ex rel Barry v. Mercein*, 8 Page 54.

The court is convinced of the truthfulness of the woman's testimony that the respondent bought her in China and that she has been forced to live the life of a prostitute ever since she has been in Hawaii. Her statement as to the character of life she has been living is borne out by the testimony of the woman, Ah Yee, who for three months prior to July, 1903, acted as a nurse for the two children. She says that she saw many men coming to the room of Jung Hung and passing the night there during that time; that Jung Hung slept in the same room with the men that came there, while the reputed husband, Jue Gun was walking about outside her door.

Lee Chee Hing, the petitioner, testified that Jung Hung carried on the business of a prostitute and that he had gone there many times during the past four years to pass the night with her; that he went there first at the solicitation of Jue Gun. He also testified that Jue Gun stated that he would stab the woman to death if she attempted to go and live altogether with petitioner. It is in evidence that petitioner wished to marry the woman and take her away from this life.

Jung Hung testified that she was compelled to prostitute herself for money and give the money to Jue Gun; that she was in fear of her life; that she was afraid to leave the house as he had made threats to kill her if she did so. The testimony

of the United States Marshal is significant as showing the condition of matters. The woman according to his testimony while exhibiting fear and depression when he removed her from the home of the respondent, yet her whole demeanor changed and she looked pleased and happy when finally placed in the jail.

It is true the testimony does not disclose any actual physical restraint upon the part of the respondent to prevent the woman from leaving the house where she was restrained. However, it matters not in what manner or by what means a person is restrained of his liberty. It may be by threats as well as by forcible action if the power exist to enforce the threats. A person need not be put under lock and key to be deprived of liberty.

As has been said by a learned judge, "liberty as protected by the Constitution is not cramped into a mere freedom from physical restraint of the person." *People v. Marx*, 99 N. Y. 377, 386.

"Words are sufficient to constitute an imprisonment if they impose a restraint upon the person and the plaintiff is accordingly restrained, for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence is used." *Pike v. Hanson*, 9 N. H. 493; *Hurd on Habeas Corpus*, 210.

The evidence shows that the respondent has done no business for over four years; that the house where he lived with the woman Jung Hung was a sort of an opium den where his friends came to smoke that narcotic. He testified that it cost him over forty dollars a month to live, but unlike the majority of his race who are industrious, he has no known means of livelihood; the woman testified that she earned from eight to ten dollars a day as the results of her shameful vocation and that she gave the money to respondent. One does not need to seek far for a motive for keeping this woman in the fear and restraint of personal liberty in which she was held. She was a valuable asset to the petitioner.

Every person under the Constitution and laws of the United States is entitled to the enjoyment of personal liberty;

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right of free locomotion to go when and where one pleases, and to do all that is necessary in the conduct of one's affairs restrained only so far as one infringes upon the rights or the welfare of others. *Snyder v. Walford et al.*, 11 Mo. 513; *Pinkerton v. Verberg*, 78 Mich., 573; *City of St. Louis v. Roche*, 126 Mo. 541; *State v. Austin*, 114 N. C. 855.

And again; it is not possible for any Asiatic to introduce into this territory undisturbed, any of the customs or laws of China which are in violation of the Constitution. A condition of slavery of the lowest type has been shown to exist in this case; and no form of slavery or involuntary servitude except as a punishment for crime and upon due conviction thereof can under the thirteenth article of the amendments to the Constitution of the United States, be permitted to exist in this territory. *U. S. v. Wong Kim Ark*, 169, U. S. 649, 677.

The writ is allowed, the woman Jung Hung released and the respondent is ordered to pay the cost of this proceeding. Any attempt hereafter made upon the part of respondent to exercise any power or control over this woman will be treated as a serious contempt of court, and will be punished accordingly.

JULIUS A. SCHIRRMACHER *v.* THE SHIP "ERSKINE
M. PHELPS," R. J. GRAHAM, claimant.

DECIDED: OCTOBER 15, 1903.

1. A seaman who is injured while in the service of the ship is entitled to medical care and nursing and to a cure, if possible, at the expense of the ship, and all reasonable measures must be taken to that end.
2. Where a seaman in the performance of his duty, and without fault on his part is injured in the service of the ship and there is no one aboard the ship competent to treat the injury, it is the positive duty of the master of the ship to take him to the nearest port where proper medical or surgical treatment can be obtained, and the failure of the master to do so is negligence for which the ship and its owners are liable.

Where a seaman is incapacitated for work through injuries received while in the service of the ship, he is entitled to his full wages to the termination of the voyage.

4. Where a seaman was shown to have fallen and broken his leg on board a vessel while said vessel was navigating Cape Horn during a storm, and there was no one on board the vessel who had surgical knowledge, the leg being rudely set by the first officer; and where it appeared that at the time of the accident the vessel was 484 miles from Port Stanley in the Falkland Islands, and over seven thousand miles from her port of destination, Honolulu, in the Territory of Hawaii, and the winds and currents were favorable to making the Falkland Islands in less than two days, where surgical treatment could have been obtained for the injured seaman, and where it was further shown that within eleven days after the accident, the vessel was less than 900 miles from Valparaiso and less than 800 miles from Valdivia, both on the coast of Chili, where surgical aid also could have been obtained, and where it appeared that the master of the vessel made no attempt to make any of these ports, but continued his voyage to Honolulu, reaching that port two months after the injury occurred, the injured man having hurt the leg again in the interval through another fall, and being unable to walk without crutches or canes, and the leg being deformed and shorter than the other by reason of the overlapping of the bones due to the imperfect setting of the same, *Held*, that the master of the vessel was guilty of negligence in failing to put into the nearest port, as soon as possible after the accident happened, for surgical aid for the injured man, for which negligence the ship and its owners are liable, and damages awarded in the sum of \$1,800.

IN ADMIRALTY. LIBEL *in rem* FOR PERSONAL INJURIES SUS-TAINED BY SEAMAN.

T. McCants Stewart and J. J. Dunne, for libellant.
Holmes & Stanley and Robert W. Breckons, for libellee and claimant.

ESTEE, J. This is a libel *in rem* in admiralty filed on behalf of a seaman on board the ship "Erskine M. Phelps" for damages in the sum of ten thousand dollars for personal injuries sustained on board the ship while engaged in his duties as such seaman, on a voyage from Norfolk, State of Virginia, to Honolulu in the Territory of Hawaii.

Said vessel left Norfolk on May 1, 1903, arriving in Honolulu on the 15th of September, 1903. While said vessel was navigating Cape Horn and during very stormy weather, on July 15th, 1903, the libellant, without any carelessness or negligence

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on his part, was washed down on the deck by a heavy sea, thrown between the rails and stanchions of the ship with great force and violence and sustained a fracture of his right leg. Several others of the seamen were also somewhat injured at this time, but no one of them, so far as the evidence showed, suffered any serious damage save libellant.

There was no medical man aboard the vessel who could render any surgical aid to the libellant, but the leg was rudely bandaged by the mate, with cloths, and after a day placed in splints and rested in a sling attached to the ceiling over libellant's berth in the forecastle, where the libellant remained for some five weeks, when he was first assisted on deck with the aid of a cane and a crutch. He again slipped and fell, breaking the injured leg and had to be carried back to his berth, where he stayed until within a few days of Honolulu, when he was again helped on deck. The ship reached Honolulu on September 15, 1903, two months after the accident occurred, but it was not until the third day after reaching said port that libellant was removed to the United States Marine Division of the Queen's Hospital, by the captain of the ship, where he has since remained. The bones of the injured leg overlapped about an inch and a quarter, and libellant at the time of the trial was unable to walk save with the assistance of canes or crutches.

Although the allegations of the libel would seem to indicate an intention on the part of libellant to fasten the blame for the injury primarily on the owners of the vessel by reason of negligence in the loading of her cargo, resulting in a necessity to shift the same while navigating that well known dangerous locality, Cape Horn, and thus practically causing the injury to libellant by the listing of the ship, yet no evidence was introduced in pursuance of those allegations or tending to prove such negligence on the part of the owners of the ship.

As was said by this Court in the case of *Langaas v. The Barkentine "James Tuft,"* ⁽¹⁾ decided July 3, 1903:

"Among the positive duties which the owner of a vessel owes to its crew are to see that the vessel is seaworthy in all particulars; that it is provided with all necessary appliances for the

safety of the ship and of the men; that the ship is properly manned and provided with proper food supplies; and further, that in case of sickness or injury of any member of the crew, that he shall be given proper care and medical attendance. For a failure in the performance of any one of these duties, the owner of the ship is liable."

No proof was introduced in this case of a failure in any one of these duties except a neglect to provide proper medical care and attention for the injured seaman.

The case then narrows itself down into the single proposition of whether it was reasonably possible for the captain of the ship to have obtained proper medical care and attention for this man after the accident which resulted in the breaking of his leg.

At the time this man's leg was broken first, as is shown by computations made from the log of the first officer, the ship was less than five hundred miles, to be accurate some four hundred and eighty-four miles from Port Stanley, in the Falkland Islands; and as also appears from the testimony of the first officer, and by reference to his log, with winds favorable for making this port within two days. Honolulu, the port of destination, was then seven thousand seven hundred miles distant, or practically that amount, as the captain testified that 7700 miles was the distance from Cape Horn to Honolulu.

On August 6, 1903, the ship was less than nine hundred miles from Valparaiso, less than eight hundred miles from Valvidia, both on the coast of Chili; while on August 19th the ship was within 2028 miles of Tahiti and 2426 miles from Tai-o-hae, in the Marquesas. At all of these ports, it is well known, if not actually in evidence, that medical and surgical aid could have been obtained.

A seaman who is injured in the service of the ship is entitled to medical care and nursing and to a cure, if possible, at the expense of the ship, and all reasonable measures must be taken to that end. *Whitney v. Olson*, 108 Fed. 292; *The Troy*, 121 Fed. 901; *Brown v. Overton*, 1 Sprag. 462, Fed. Case 2024; *The City of Alexandria*, 17 Fed. 390.

This seems to be settled law. The injured seaman is to be cured at the expense of the ship, if the cure is possible; but all necessary steps must be taken to effect that cure, and these steps must be the usual and reasonable means employed.

The duty of the captain of a ship is to do all in his power for the safety of the lives and limbs of his men. He holds their lives and their health while on ship board largely in his keeping; and while the men must obey all lawful commands and do all they can in the line of their duty to preserve the ship and its cargo, they necessarily look to the captain and his officers for all reasonable care in case of sickness and reasonable aid in case of injury. Any man of common intelligence knows that a man not professionally educated in surgery, acting as the mate of a ship, cannot properly set a limb when broken, and the photographs of this man's leg, taken with the X-ray, show clearly that his limb was not properly set, although it was done with the primitive knowledge claimed to be possessed by the mate.

Notwithstanding the statements of Dr. Cooper to the contrary, I think a voyage of nearly seventy-seven hundred miles across the ocean is a severe test of the physical endurance of a man suffering with a broken leg crudely set by one admittedly without surgical knowledge.

In the line of the ship's duty to the seaman to provide him with medical aid, care and nursing, it was the duty of the captain of the ship to have put into the nearest port to have obtained such aid. While this duty must have been known to the captain of the ship, as he is an old navigator, yet not the slightest attempt was made by him, as the evidence shows, to go anywhere to seek such medical aid, but he simply continued on his long voyage to these islands.

The captain seemed to have been peculiarly indifferent in reference to the whole matter. He never went to see this man but twice, once immediately after the occurrence of the accident, again the next day, when he told him he could do nothing for him, but that the mate would attend to him. The captain himself testified that after ordering the mate to attend to libellant, he only saw him, with the exception of these two instances cited,

through the skylight of the forecastle where the man lay. In fact, he seemed to avoid coming in contact with him. And even after the vessel arrived in Honolulu, Captain Graham went "about the ship's business," as he testified, for nearly three days without having the libellant sent to a hospital where he could have received treatment. Libellant should have been sent to the hospital at once upon the arrival of the vessel and he should have been paid the wages then due him; and not have been sent alone finally to the U. S. Marine Division of the Queen's Hospital without any money, with but a slight knowledge of the English language, and unable to walk.

Where a seaman in the performance of his duty, and without fault on his part, is injured in the service of the ship, and there is no one on board competent to treat the injury, it is the positive duty of the master of the ship to take him at once to the nearest port where proper medical treatment can be obtained, and the failure of the master to do so is negligence for which the ship and its owners are liable. *The Iroquois*, 113 Fed. Rep. 964; *The Iroquias*, 118 Fed. Rep. 1003; *Brown v. Overton*, 1 Sprag. 462, Fed. Case No. 2024.

And this, too, without reference to any loss of time or risk to the cargo or to the vessel. *The Iroquois*, 113 Fed. Rep. 964.

As was said by Judge De Haven in the last above mentioned case—

"I cannot agree to the proposition that the sacrifice of time and risk to cargo are matters which can properly be permitted to outweigh the duty of procuring surgical aid for a seaman disabled in the service of the vessel when such assistance is necessary and cannot be obtained otherwise than by putting into port. The obligation of the ship is discharged only when the master has used reasonable care in providing for the comfort and cure of the seaman * * *. But it would seem clear that if one of the crew were so ill or severely injured that anyone of ordinary judgment seeing him would know that his life or limb was in serious danger and that he ought to have medical or surgical aid at the earliest possible moment, then it would be the

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imperative duty of the master to take the necessary steps to procure such aid if within his power."

In this case, there is no doubt but what it was within the power of the master of the ship to have procured this aid for libellant within two days after the injury occurred. According to the testimony of Captain Graham, the ship with favorable winds and all sails set could make two hundred and eighty-eight miles a day. On the day the accident occurred, the ship was some four hundred and eighty-four miles from the Falkland Islands, where at Port Stanley there could have been obtained the aid of competent surgical men. The winds and currents were favorable to take the ship there. It appears from the testimony of the first officer, Helbron, who made the log and had charge of it, that said log showed the position of the ship at that time to have been 58 degrees, 29 minutes south latitude, 65 degrees, 30 minutes west longitude, with the wind blowing northwest to west-northwest. The Falkland Islands were then east and north of the position of the ship. It is well known to navigators, and it appeared in evidence, that there is a sea current running eastward and northward from Cape Horn. The first officer, Helbron, testified that at that time the wind was west, the current setting north and east, and that in his opinion "they could have gone to the Falkland Islands if they wanted to."

The evidence is clear that at the time of the accident and after, strong westerly winds were blowing and continued, while the ship was see-sawing back and forth, beating to the westward. The winds and currents being so heavy, pushed the vessel backward in the direction of the Falkland Islands, to the eastward.

In view of these facts, it is reasonable to suppose that if the captain had had the well being of the libellant in view, and fully understood his duty in the premises, he would have changed his course and sailed direct for Port Stanley, which he could have reached in less than two days, if his testimony is correct that, with favorable winds, he could make two hundred and eighty-eight miles a day.

The reasons given by Captain Graham for not putting back to Port Stanley were that it was a dangerous harbor; that his crew

were disabled and that he could not have made that port without great risk. In view of the fact that there is not a particle of evidence that any of the men injured or hurt on the fifteenth of July were at all seriously hurt with the exception of libellant and one man, Shulz, who stated that he was laid up for nine days, and in view of the further fact that he had then seventeen men remaining, his full crew of able-bodied seamen being nineteen, if I recollect rightly, the latter excuse does not seem sound; and especially from the fact that if the ship's course had been directed to Port Stanley, the winds and currents being shown to be favorable, it would have been easier to have made that port with a disabled crew than to have gone on fighting against the winds and currents with such a crew, (conceding that the vessel was short-handed for thirteen days), the length of time the rough weather continued, according to the captain's testimony.

As to the evidence of the captain and some of his witnesses, who were masters of vessels like himself, that the port of Stanley was a dangerous one to make, this seems directly contradictory of the history of that port. It is well known that for many years ships have put in there for supplies, and that now there are in the town of Port Stanley repair shops, where, in the language of a well known authority, the Encyclopaedia Britannica (Werner's Edition, published in 1900), "ships can be repaired and provided in every way, much better and more safely than at any of the South American ports,—a matter of much importance, seeing that a greater amount of injury is done annually to shipping passing near Cape Horn by severe weather, than in any other locality in the world. The average number of vessels entering Stanley Harbor in the year is about fifty, with an aggregate tonnage of 20,000; of this number a fourth arrive in distress and are repaired at Stanley."

The evidence of the captain further disclosed that he could have reached Valparaiso within twenty-five days after the first accident occurred, and on August 6th could have sailed there in nine days. While there is some evidence showing that up to within thirty-seven hundred miles of Honolulu, he could more readily have reached the ports of Papeete, on the Island of

Tahiti, or Tai-o-hae, in the Marquesas, where surgical aid could have been obtained. Such a possibility never seemed to have entered into the calculations of the captain, as he made no effort to make any port but his port of destination. And while it is said libellant did not ask to be taken to the nearest port for aid, yet that did not relieve the captain of his duty in the matter. The former may have been ignorant of his rights and so failed to ask to have them enforced.

I am of opinion that the captain was negligent in not taking the course the law required of him, namely, to have put into the nearest port, and the ship and owners thereof are liable for such negligence.

While the bones of this man's leg have knit, yet it is in evidence that the fractured bones overlap an inch and a quarter, which causes a consequent shortening and deformity of the leg. He is unable to walk without the aid of a cane or crutches: while from the testimony of the medical witnesses it will be at least a year from the time of the accident before he is able to have a natural muscular use of the leg and resume his vocation as a seaman.

If this man had had proper medical care within a reasonable time after the injury he might possibly still have a leg which, while not as perfect as the uninjured one, yet the deformity would not be apparent and he would have been saved the pain and suffering incident to the two months during which he was without medical assistance, and during which time he again injured the leg by falling, entailing more pain and suffering.

Libellant shipped aboard this vessel on the first day of May, 1903, and the vessel reached this port on the fifteenth of September, 1903. He was to receive \$18 a month as wages. None of this wage has been paid him so far as the evidence shows, and he is therefore entitled to the sum of \$81 wages for four months and a half, as while he was incapacitated from work during a portion of that time, such incapacity arose from injuries received while in the service of the ship. Desty Shipping and Admiralty, Sec. 155, and cases there cited. I cannot, however, award

him that sum in this action as no demand is made for the same in the libel.

Libellant is entitled to damages for the pain and suffering and the injury he received by reason of the failure of the captain to seek a port where medical aid and attendance could have been obtained as the law requires, and which he could have obtained by going into the nearest port, which in this instance was either Port Stanley, in the Falkland Islands, or failing in that, then Valparaiso or Valdivia on the coast of Chili. I will award the libellant in full for all such damages, excepting the wage which should have been paid him upon the termination of the voyage, the sum of eighteen hundred (\$1800) dollars, together with costs of suit.

Let judgment be entered accordingly.

(1) See Ante, P. 420.

APPENDIX.

POWERS AND DUTIES OF GRAND JURORS IN THE COURTS OF THE UNITED STATES.

CHARGE TO THE GRAND JURY, OCTOBER 12, 1903.

At a term of the United States District Court for the District of Hawaii, held at the city of Honolulu, on the 12th day of October, 1903, a grand jury was impaneled and to its foreman the following oath was administered:

"You, as foreman of this inquest for the body of the District of the Territory of Hawaii, do swear that you will diligently inquire and true presentment make of such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service.

"The government's counsel, your fellows and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; neither shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding, so help you God."

Then to the rest of the grand jurors, the following oath was administered:

"The same oath which your foreman has taken on his part, you and every one of you shall well and truly observe on your part. So help you God."

ESTEE, J. Then charged the grand jury as follows:
Gentlemen of the Grand Jury:

You have been called here as members of the Grand Jury of the United States District Court of Hawaii during the term of court just opening and the duties which will devolve upon you are of grave importance. By the fundamental law of the

United States, namely, the Constitution thereof, it is prescribed that—

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger." Sec. 1, Article V.

You will therefore observe that no steps can be taken for the prosecution of any crime of the character indicated until your body shall have acted. The whole series of felonies belong to the class of infamous crimes mentioned. You will therefore note how indispensable to the administration of justice in criminal cases is the action of the grand jury.

You are officers of the United States and as such, deal only with offenses against the laws of the United States, or which are made such by United States laws. You have nothing to do with offenses under the laws of the Territory of Hawaii.

Your jurisdiction, however, in the investigation of offenses made such by the laws of the United States, extends over the whole Territory of Hawaii, and you are to fairly and without fear or favor investigate all crimes within the Territory which come under that category.

I wish to say further to you in relation to the character of your duties, that the grand jury is designed not alone as a means of bringing to trial persons accused of crime upon just grounds, but it is also a means of protecting the citizen against unfounded accusations whether they proceed from the government or are prompted by individual enmities or personal passion. There is, therefore, a double duty cast upon you as grand jurors of this district; one is that duty to society to see that parties against whom there is just ground to charge the commission of a crime shall be held to answer thereto, and on the other side, a duty to the citizen to see that he is not subjected to prosecution upon erroneous accusations.

Your sessions shall be secret. This is just. It would work a great hardship to any citizen against whom charges might be brought to you for investigation, if as a result thereof you

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should find them unfounded, and said charges had been made public.

You must examine all matters called to your attention by the Court; also all matters called to your attention by the United States District Attorney. You will also examine all cases of alleged violations of United States laws that may be brought to your attention and evidence presented thereon, aside from any matter that may be brought before you either by the District Attorney or indicated in this charge.

You are not, however, to consider or examine the books or accounts of Federal officers; these matters are left to the heads of the departments to which these officers belong.

It may be possible that some of you have, within your personal experience, knowledge of the commission of a public offense against the laws of the United States or of facts which tend to show that such an offense has been committed. If you are possessed of any such knowledge, you should disclose it to your associates so that they may consider it.

If any attempt is made to influence your action as grand jurors, it will be your duty to immediately notify the Court. It is provided by Section 5405 of the Revised Statutes of the United States, that—

"Every person who attempts to influence the action or decision of any grand juror upon any issue or matter pending before such juror, or before the jury of which he is a member or pertaining to his duties * * shall be punishable by a fine * * * or by imprisonment or by both. * * "

In considering the evidence presented to you in each case, you will remember that all persons, no matter what the charge against them may be, are presumed to be innocent until proven guilty. And to justify the finding of an indictment, you must be convinced so far as the evidence goes, that the accused is guilty; in other words, if in your judgment the evidence before you would if unexplained, and uncontradicted, warrant a conviction by a petit jury you should find an indictment.

The general government has selected the United States District Attorney to represent its interests in all prosecutions. He

will at all times be ready and willing to aid you in your investigations. He will call and examine witnesses and if need be interpreters to assist you in your labors; but if you so desire you can call and examine witnesses of your own volition.

The District Attorney has no right to be present during your deliberations or when you vote; no one but members of the grand jury can be present at your deliberations or at your voting.

In your examinations you will hear and consider only legal testimony; mere hearsay testimony you will discard. And if in your investigations you find, or become convinced that there is evidence not produced which would explain away a charge presented to you, it will be your duty to get such evidence if it is possible to do so.

I wish further to state to you that it requires the affirmative vote of at least twelve of your members to find an indictment.

Among the matters placed before you for investigation, there are likely to be certain offenses arising under Sections 5526 and 5527 of the R. S. U. S. known as the "peonage" statutes.

Section 5526 prescribes that—

"Every person who holds, arrests, returns or causes to be held, arrested or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years or by both."

Section 5527 reads as follows—

"Every person who obstructs or attempts to obstruct or in any way interferes with or prevents the enforcement of the preceding section shall be liable to the pains and penalties therein described."

It should also be borne in mind that our Constitution is opposed to all forms of peonage, slavery or servitude. All men are free from the moment their feet rest on American soil, for our fundamental law and the acts of Congress passed in conformity therewith intend that neither slavery nor involuntary servitude shall exist anywhere in America. This constitutional

prohibition applies with equal force to foreign as to American born people living in the United States. No man is too great or too small not to be bound or protected by it. This Republic rests upon the sacred principle that all men are born free and equal. Peonage is un-American. It matters not from what country the peon immigrates or what agreement he comes under, he cannot with impunity translate to our shores any form of servitude; nor can he implant here, unresisted by our laws, the principles peculiar to slavery or the customs of his own country. American law is designed to enforce all the personal rights due each human being in America and in that sense it teaches morality.

It is further provided by Section 3 of the Act of March 3, 1903, being "An Act to regulate the immigration of aliens into the United States," that—

"The importation to the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution or who shall hold or attempt to hold any woman or girl for such purposes, in pursuance of such illegal importation, shall be deemed guilty of a felony and on a conviction thereof shall be imprisoned not less than one year nor more than five years and pay a fine not exceeding \$5,000."

It is believed that there has been brought here quite recently a number of these unfortunate women and girls, to be held for the purposes of prostitution. It will be your duty as American citizens and public officers to investigate these matters thoroughly so that the guilty may be punished; and in making your investigations you must bear in mind that these alleged offenses, like all crimes, are committed in secret and will require at your hands the most patient inquiry.

Furthermore, it is prescribed by Section 3 of the Act of Congress of March 3, 1887, (Vol. 24, U. S. Stats. 635)—

"That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years, and when the act is committed between a married woman and a man who

is unmarried both parties to such act shall be deemed guilty of adultery, and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery."

This act of Congress is applicable to all such offenses committed within this Territory. The highest evidence in favor of the advanced civilization of a community is the punishment imposed on offenses against the moral laws. Some of this class of cases will be brought to your attention and it will be your duty to fully and fairly investigate the same, and find indictments where you believe a petit jury would be convinced of the guilt of the parties, from the facts as presented for your consideration, if no evidence were introduced to contradict the same.

Gentlemen of the Grand Jury: You may be called upon to investigate a charge of perjury; and in this connection I instruct you that the laws of the United States contemplate that a statement made under oath before a competent officer of the law, shall be strong evidence of the truth of the facts stated, and in order to preserve inviolate the solemnity of an oath under the forms prescribed by law, and to punish any violations thereof, it is prescribed by Section 5392 of the Revised Statutes of the United States, that—

"Every person who having taken an oath before a competent tribunal, officer or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true, wilfully and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall moreover, thereafter be incapable of giving testimony in any court of the United States, until such time as the judgment against him is reversed." It might also be added, that this law is made applicable to oaths before immigration officers. Sec. 24, Act of Mar. 3, 1903, (Vol. 32, U. S. St. 1213).

It is provided by Section 8463 of the R. S. U. S. as amended by the Act of January 3, 1887, that—

“Any person who shall with intent to defraud, falsely make, forge, counterfeit, engrave or print, or cause, or procure to be falsely made, forged, counterfeited, engraved, or printed, or willingly aid or assist in falsely making forging, counterfeiting, engraving, or printing, any order in imitation of, or purporting to be, a money order or postal note, issued by or under the direction of the Postoffice Department of the United States, or of any foreign country, and payable in the United States, or any material signature or indorsement thereon; or any material signature upon any receipt, or certificate of identification thereon; any person who shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering, any such money order or postal note; any person who shall with intent to defraud, pass, utter or publish as true, any such false, forged, counterfeited or altered money order or postal note, knowing the same or any signature or endorsement thereon, to be false, forged, counterfeited or altered, shall be punishable by a fine of not more than five thousand dollars or by imprisonment at hard labor for not less than two years and not more than five years.”

Congress has established a Postal Money Order system in the United States and in doing so has provided for the protection of all money or postal orders issued by authority of the Postal Department of the government, and the punishment of all violations of the Postal Laws in that regard. You will be called upon to examine some offenses of this character, and you will give them the same careful consideration that you do to all offenses against the laws of the United States laid before you for investigation.

Finally, among the matters which you will be called upon to consider, will be violations of the Act of June 10, 1890, entitled “An Act to simplify the laws in relation to the collection of the revenue” (Vol. II, Supp. R. S. U. S. 750), commonly known as the “Customs Administrative Act.”

The particular violation of this law arises under Section 9 thereof, which reads as follows:

"That if any owner, importer, consignee or agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof accruing upon the merchandise or any portion thereof embraced or referred to in such invoice, affidavit, letter, paper or statement, or affected by such act or omission, such merchandise or the value thereof to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. And such person shall, upon conviction, be fined for each offense, a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years or both, in the discretion of the Court."

It is needless for me to remind you that the object of this section of the Customs Administrative Act is to secure to the United States its just duties. And it is also the intent of the revenue laws of the United States that all parties importing or bringing into the United States merchandise of any kind, shall stand upon an equal footing before the law. And any violation of these customs laws is not only a deprivation of the United States of its just dues, but also works an injustice to all others who conform to the laws and pay the duties imposed upon the merchandise they import.

Gentlemen of the Jury: It has been the settled policy of the United States to exclude from our shores certain classes of immigrants deemed to be an undesirable element to add to our population, and the laws of Congress passed relative thereto from time to time, have been sought to be rigidly enforced by both the administrative and judicial branches of the government. Among the classes excluded are women and girls who are im-

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ported for purposes of prostitution, which subject I have already called to your attention.

Among the other classes are persons unlawfully brought to the United States under the provisions of the Act of March 3, 1903, relative to the "Immigration of aliens into the United States" such unlawfulness consisting in the fact that they have been assisted or encouraged to come into the country under contracts or agreements, or offers or promises of labor and their transportation prepaid by the parties encouraging them to come into the country under the conditions stated.

I do not deem it necessary to go into these laws in detail. The United States District Attorney, as I have heretofore suggested to you, will be ready and willing to aid you in your investigations into all these matters, making clear to you what laws are claimed to have been violated and in what respect.

If you should desire any further instructions from the Court you are at liberty to ask for them at any time and upon any of the matters embraced in this charge or any other offenses that you may have under investigation.

I appoint Mr. Atwater your foreman; you can select your own secretary.

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ADMIRALTY.

1. Under Section 1109 of the Compiled Civil Laws of Hawaii of 1897, and the decisions of the Supreme Court of the Territory of Hawaii, jurisdiction in admiralty sustained in an action *in personam* instituted by a widow to recover damages for the wrongful killing of her husband, a drayman, by reason of the breaking of a chain used in lowering a bed plate weighing some 25,000 pounds from the schooner Robert Lewers owned by the libellee, where it was shown that the officers and men of the schooner had entire charge and control of the appliances used in the lowering of the said bed plate, and negligence was proven.—*Kekauoha v. Robert Lewers Co.*, 75.
2. The master's order for supplies is sufficient proof of their necessity.—*Hall, et al. v. Schooner "Howe,"* 238.
3. The burden of proof is on the ship to show that it was fitted out with all the needed articles of food and medicine, and it is not alone what provisions and medicine are shown to be aboard the vessel, but what the seamen are supplied with and how they are supplied with it that controls in actions based on Section 4568, R. S. U. S.—*Hall et al. v. Schooner "Howe,"* 238.
4. Under Section 4612 of the R. S. U. S. as amended by the Act of Congress of December 21, 1898, certain daily rations are to be served to the members of the crew; and the mere furnishing of the amount of food required by law to be given to the men, if the same is not edible, is not a compliance with the terms of the statute.—*Hall, et al. v. Schooner "Howe,"* 238.
5. Where it was shown that there were no weights or measures on board the schooner, as required by Section 4571 of the R. S. U. S. but that the cook guessed at the amount of food that the men received, *Held*, that neither the master nor the cook has a right to issue to the men provisions according to a method of his own, unless the men agree to such method, and even then the action is doubtful. *Hall v. Schooner "Howe,"* 238.
6. When the statute regulates what the rations of seamen shall be the statute must be followed. Except only in cases of great sea peril, those statutory rations must be supplied and must be reasonably well cooked.—*Ib.*
7. Where in the process of transferring sugar from the hold of one ship into the hold of another ship, with the usual and customary appli-

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ances, a sling containing some 1250 pounds of sugar was lowered unexpectedly by an employe of the defendant on to the deck of the ship into whose hold the sugar was being loaded, severely injuring the mate of said ship who made ineffectual attempts to get out of the way of the descending sugar, and some evidence was introduced as to the giving of warnings of the coming of the sugar by the officers of the defendant, *Held*, that these warnings were not shown to have been brought home to the injured person. And further held, that "even if the warnings had been heard by him and disregarded, thus showing a degree of negligence on his part, that would not have relieved the defendant from the results of its negligence, if by the exercise of reasonable care it could have avoided the consequences of libellant's negligence.—*Lorenzen v. I. I. S. Nav. Co.*, 267.

8. Where it was shown that after a sling load of sugar was hoisted out of the hold of a ship and suspended from the donkey fall, that the strain was then transferred from the donkey fall to the burden line, and the duty of the burden man was to lower away slowly to the deck of the ship into whose hold the sugar was being loaded, and that in order to control the line, the burden man was obliged to take sufficient turns of this line round a post, the evidence as shown by the libellee's own witnesses, that at the time of the accident he took but three turns, thereafter taking four, when no further difficulty was experienced in controlling the line, *Held* to be a very significant fact in considering the cause of the injury.—*Lorenzen v. I. I. S. Nav. Co.*, 267.
9. The fact that the officers and crew of the defendant's ship had exclusive control of the appliances and gear being used in transferring the sugar from one ship to the other, is an important element in considering suits for damages arising from injuries sustained during the process of transferring said sugar.—*Lorenzen v. I. I. S. Nav. Co.*, 267.
10. In an action brought by the engineer of the steamship "Helene" admitted to be a vessel engaged in the "coaswise trade," which action is based on Section 4546 R. S. U. S., and where it appeared that in an action before the District Magistrate of Honolulu, a judgment was rendered against libellant, and his wages in the hands of the Wilder Steamship Co., garnisheed, which Company had thereupon refused to pay said wages to libellant, and it being shown that libellant had signed before a Shipping Commissioner at San Francisco when entering the service of said Company, *Held*, that under the provisions of the Act of February 18, 1895, Vol. 28, U. S. Stats. 667, the wages of libellant were exempt from garnishment.—*Holland v. Steamship "Helene"* 281.

11. Where a stevedore while under a contract with a "boss" stevedore was injured on board a ship lying in port, while engaged in unloading her cargo, the said injury resulting from the action of a fellow stevedore, and where the allegations of the libel distinctly and in terms exonerates the officers and crew of the ship from any blame in the matter, as they were not connected with the unloading of the ship and had no control over the same, upon an exception filed to the admiralty jurisdiction of the court, *Held*, that the mere fact that a ship was incidentally connected with the tort, did not make the matter a maritime one, or bring it within the admiralty jurisdiction of the court, and said exception sustained.—*Campbell v. H. Hackfeld & Co.*, 319.
12. It is the duty of the master of the vessel to maintain order; and the duty of the crew to obey orders.—*U. S. v. Gisaburo*, 323.
13. In an action in admiralty where the libellant was shown to be a corporation organized under the laws of the State of California, upon a motion to dismiss the libel during the progress of the trial based upon the fact that libellant had not complied with the provisions of Act 45 of the Session Laws of 1898, of the Republic of Hawaii, continued in force by the Act of Congress for the government of the territory, *Held*, that the provisions of such law related only to territorial courts, and that in no event could a law of that character affect the jurisdiction of the United States District Court of Hawaii in relation to admiralty cases. Motion denied.—*Spreckels Bros. Co. v. "Nevadan," et al.*, 354.
14. Where the method used in transferring sugar from a wharf to a boat sustained in position only by its oars in the open sea, was shown to be the following: the man in charge of the derrick and winch on the landing suspends the sling load of sugar out over the boat and there holds it to await a signal from the men in the boat when they are ready to have it lowered into the boat; and it was shown in the special instance complained of, that no signal was given for him to lower the sling load, containing some 1250 pounds of sugar into the boat, but that he did so without warning to the men in the boat thereby severely injuring one of the crew thereof, and the man in charge of the winch claimed that the boat was lifted up on a big wave and struck the under side of the sling of sugar and that the injury to the member of the crew resulted from that fact without any negligence on the part of the winch man. *Held*, that if the boat had risen upon the big wave as claimed and the sailor had been lifted up with the boat and injured, yet the same wave would have carried the boat past the sling load of sugar, which, if held in position by the winchman, would have remained suspended even after its impact with the boat; and the fact that the sling load of sugar did not remain suspended but remained in the boat on top of the unconscious sailor, shows conclusively to the mind of the court that the winch-

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man had negligently let go his hold of the sling load of sugar.—*Palapala v. Paauhau Sugar Plantation Co.*, 387.

- 15. Where it was shown that the winchman had entire control of the winch on the wharf, and was subject to no orders from any one in relation to the lowering of the sling loads of sugar, save the signals from the men in the boat when they were ready to receive the same; and where it appeared that the winchman either saw, or if he looked, could have seen the incoming waves, *Held*, that by the mere raising or lowering of a lever he could have controlled the position of the sling load, and if the conditions of the accident were such as are claimed by him, it would still have been but the work of a moment for him to have raised the sling load out of the way of the wave and the boat, and thus have avoided the accident, if he had exercised such vigilence as was incumbent upon him.—*Ib.*
- 16. In an action *in rem* in admiralty for damages for injuries sustained by a seaman on board the barkentine "James Tuft," where it appeared that said seaman was thrown down on the deck by heavy seas and caught under a spar lashed amidships, which spar rose and fell upon the seaman breaking his thigh bone; it being claimed by him that the injury was due to the improper placing of said spars on said ship and in the insecure lashing of the same, and where it was shown to be customary to place such spars on board sailing vessels to be used in case of emergencies, *Held*, that while there was some doubt as to whether this spar was properly placed or securely lashed to the deck, yet in the absence of any allegation or proof of either incompetency among the officers or of neglect in providing the usual number of men required to man the vessel, or of unseaworthiness in any particular, the accident was the result of the perils of navigation and resulted from the risks incident to the libellant's employment, for which the vessel is not liable.—*Langaas v. Barkentine "James Tuft,"* 420.
- 17. The fact that the master was a part owner of the vessel held not material in the absence of any evidence of such negligence as would entitle the libellant to damages for the injury primarily done him.—*Ib.*
- 18. Upon the trial of a libel *in personam* against the owner of a steam vessel for wages due libellants and for damages for breach of contract, where it appeared that libellants had been engaged by one Baker acting as the agent of the defendant for this transaction, to go from Honolulu to Hilo to take charge of a steam vessel and bring her down to Honolulu as captain and first officer respectively, but upon arriving at Hilo where the vessel lay, the agent of the defendant in charge of the vessel there, refused to recognize the employment of the libellants in the capacities indicated, or at all, *Held*, that under the facts as shown in this case, the employment of

the libellants was within the scope of the authority of Baker; that the contract was for libellants to bring said steam vessel to Honolulu; and upon the failure of the defendant to carry out its part of the contract, through the action of its agent at Hilo, a right of action accrued to libellants to recover damages for such breach.—*Gourley, et al., v. Matson Navigation Co.*, 429.

19. Claims for wages are very highly favored by courts of admiralty.—*Gourley, et al., v. Matson Navigation Co.*, 429.
20. Where a seaman was shown to have fallen and broken his leg on board a vessel while said vessel was navigating Cape Horn during a storm, and there was no one on board the vessel who had surgical knowledge, the leg being rudely set by the first officer; and where it appeared that at the time of the accident, the vessel was only 484 miles from Port Stanley in the Falkland Islands and over seven thousand miles from her port of destination, Honolulu, and the winds and currents were favorable to making the Falkland Islands in less than two days where surgical treatment could have been obtained for the injured man, and where it was further shown that within eleven days after the accident, the vessel was less than 900 miles from Valparaiso, and less than 800 miles from Valdivia, both on the Coast of Chili, where surgical aid also could have been obtained and where it appeared that the master of the vessel made no attempt to reach any of these ports, but continued his voyage to Honolulu, reaching that port two months after the injury occurred, the injured man having hurt his leg again in the interval through another fall, and being unable to walk without crutches or canes, and the leg being deformed and shorter than the other by reason of the overlapping of the bones, due to the imperfect setting of the same, *Held*, that the master of the vessel was guilty of negligence in failing to put into the nearest port as soon as possible after the accident happened, for surgical aid for the injured seamen for which negligence the ship and its owners are liable, and damages awarded in the sum of \$1800.—*Schirrmacher v. Ship "Erskine M. Phelps,"* 444.

See generally COLLISION,

SALVAGE, SEAMEN, SHIPPING,

JURISDICTION, 3.

NEGLIGENCE, 6, 7.

ADMISSIONS.

See EMINENT DOMAIN, 15, 22, 23.

ALIENS.

- I. There is no provision in the Act of Congress of April 30th, 1900, providing a government for the Territory of Hawaii, permitting the

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return to Hawaii of Chinese laborers who had voluntarily left the Hawaiian Islands after annexation and before said Act went into effect but with intent to return. Congress must be presumed to have known that there might be many such Chinese, and having made no provision for their return and registry after June 14, 1900, or the issuance of a certificate of residence to them, it is clear that they should be excluded.—*United States v. Yong Ho*, 1.

2. Where a Chinese laborer left the Hawaiian Islands in October, 1899, after annexation, but before the Act for the government of the Territory went into effect, and did not return within the year mentioned in the certificate entitling him to return, but returned twenty-one months after his departure, and claimed admission under said certificate, *Held*, that he does not come within the provisions of Section 101 of the Act of April 30, 1900, as he was not "in the Hawaiian Islands" when the Act for the government of the Territory went into effect, and he is not entitled to come into the Territory to register as a Chinese laborer.—*United States v. Yong Ho*, 1.
3. Chinese in the Hawaiian Islands on June 14, 1900, when the "Act to provide a government for the Territory of Hawaii went into effect, were by Section 101 thereof, compelled to procure the certificate of residence required by the Act of Congress approved May 5th, 1892, as amended by the Act of Congress approved November 3, 1893, entitled "An Act to amend an Act entitled 'An Act to prohibit the coming of Chinese persons into the United States, approved May 5, 1892,'" within one year from the said 14th day of June, 1900, or in default thereof, be deemed to be unlawfully within the United States.—*United States v. Yong Ho*, 1.
4. A hearing will be had upon an application for a writ of *habeas corpus* by a Chinese held for deportation under a decision adverse to his landing rendered by the proper immigration officers, where the hearing is claimed upon the ground that petitioner is an American citizen by reason of his birth in the Hawaiian Islands, and entitled as such to return to the Islands, after a temporary sojourn in China.—*In the matter of Lau Sam*, 6.
5. There is no provision in the Act of Congress, approved April 30th, 1900, entitled an "Act to provide a government for the Territory of Hawaii," authorizing the Collector of Customs at Honolulu to prohibit from landing at the port of Honolulu, a Chinese seaman arriving on board an American vessel sailing from an American port, New York, to said port of Honolulu.—*In the matter of Ah Sing*, 15.
6. The Territory of Hawaii is a part of the United States and subject to the so-called "Chinese Exclusion Laws" passed by Congress.—*In the matter of Wong Lin, etc.*, 44.

7. Where the decision of the Collector of Customs is adverse to the landing of a Chinese woman claiming admission to the Territory of Hawaii on the ground that her husband is a domiciled merchant therein her only remedy is an appeal to the Secretary of the Treasury from the decision of the Collector.—*In the matter of Yim Quock Leong, etc.*, 66.
8. In a proceeding to deport a Chinese woman found in the Territory of Hawaii without the certificate of registration required by the Acts of Congress, *Held*, that in order to entitle her to remain, she must show to the satisfaction of the Court either that she was born in the Hawaiian Islands, and therefore an American citizen under the provisions of the Act of Congress of April 30, 1900, providing a government for the Territory of Hawaii, or is the wife of a domiciled Chinese merchant, or the wife of an American citizen.—*United States v. Kut Yong*, 104.
9. A Chinese acting as manager of and who works on a rice plantation belonging to an unincorporated company, in which he claims an interest, but which company had no articles of incorporation or of co-partnership in which his name appears, is, under the most favorable construction to be placed upon his occupation, nothing more than an employe of the company, and is therefore not within the merchant class, but is a laborer.—*United States v. Kut Yong*, 104.
10. Asiatic nationality of defendant not to be considered; entitled to same rights in this class of cases as American citizen.—*United States v. Ohta*, 158.
11. Application for a writ of habeas corpus applied for alleging detention by the Collector of Customs at Port of Honolulu with intent to return the petitioner, a Chinese, to China, heard by the Court, the petitioner claiming that he was a citizen of the United States; and evidence held insufficient to satisfy the Court of the birth of the petitioner in the Hawaiian Islands.—*In matter of Leong Sai*, 234.
12. In an action at law based upon the provisions of Sections 4 and 5 of the Act of Congress of March 3, 1903, entitled "An Act to regulate the immigration of aliens into the United States," where defendant pleaded as a bar to the action, the decision of a board of special inquiry provided for by Section 25 of the Act, admitting the alien claimed to have been brought into the country in violations of Sections 4 and 5 thereof, *Held*, that Congress had placed no restraint upon the judgment of the United States Courts by reason of the previous action of the administrative branch of the government in the special inquiry. The question at issue between the alien and the government in that special inquiry was simply one of the alien's right to land.—*Berger v. Bishop*, 405.

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See IMMIGRATION GENERALLY.

EVIDENCE, I, 2, 3, 5, 6, 11, 13, 14.

HABEAS CORPUS, 3, 4.

MARRIAGE, I.

APPEAL.

See CUSTOMS DUTIES I, 2, 3, 6.

ASSAULT.

1. Abusive words cannot justify an assault.—*U. S. v. Manasse*, 250.
2. An assault has been defined to be an unlawful attempt coupled with a present ability, to commit a violent injury upon the person of another.—*Ib.*

See POSTAL LAWS, 3.

ATTORNEY AND CLIENT.

1. It is always presumed that an attorney appearing and acting for a party to a cause has authority to do so, and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority to sustain his denial by a clear preponderance of the evidence.—*Haw. Tram. Co. v. R. T. & L. C.*, 164.

BANKRUPTCY.

1. The provisions of Subdivision "f." of Section 67 of the Bankruptcy Act of 1898, apply equally to voluntary as well as to involuntary proceedings in bankruptcy.—*In the matter of Lum Man Suk*, 135.
2. Subdivisions "c" and "f" of Section 67 of the Bankruptcy Act of 1898 are hopelessly in conflict, but the weight of authority and the better reasoning sustain Subdivision "f" where there is any question as to which shall prevail in a proceeding relative to liens upon the property of a bankrupt obtained through legal proceedings within four months prior to the filing of the petition in bankruptcy.—*In the matter of Lum Man Suk*, 135.
3. Either one of three conditions must exist to give the United States District Court jurisdiction to adjudge a person a bankrupt, namely:
 1. He must either have had his principal place of business, resided or had his domicile within the territorial jurisdiction of the court

for the preceding six months or the greater portion thereof or, 2. While not having had his principal place of business or had his domicile within the United States, have property within the territorial jurisdiction of the court; or, 3. Have been adjudged a bankrupt by a court of competent jurisdiction without the United States and have property within the jurisdiction of the court.—*In the matter of Voeller*, 191.

4. The law presumes the domicile of origin to still exist in the absence of any proof of change of domicile.—*Ib.*
5. The burden of proof is on the party alleging the change of domicile.—*Ib.*
6. A bankruptcy proceeding is in the nature of a proceeding *in rem*.—*Ib.*
7. The province of the bankruptcy court is to marshal the assets of the bankrupt wherever they may be, so that there may be a proper administration upon his estate, and also that there may be a fair and just distribution thereof to his creditors entitled thereto; and in so marshaling said assets the court has full power to restrain any state or territorial court or officer from disposing of any of said assets until the adjudication of the debtor as a bankrupt or the dismissal of the petition.—*Ib.*
8. It was the intention of Congress in passing Subdivision "f." of Section 67 to prevent any creditor of an insolvent debtor from obtaining any advantage over other creditors by legal proceedings during a period of four months prior to the filing of the petition in bankruptcy, whether voluntary or involuntary; and all liens so obtained are dissolved by the adjudication in bankruptcy.—*Ib.*
9. Under the provisions of Section 7, Subdivision "e" of the Bankruptcy Act of 1898, which provides that "claims of secured creditors may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities,.....but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities", the Referee in Bankruptcy has power to decide as to the value of the securities of any such creditor for the purpose of allowing the claim and permitting the creditor to vote at the first meeting of the creditors of the bankrupt.—*In the matter of Omsted*, 220.
10. The valuation placed by a Referee on claims held by a secured creditor of the bankrupt, in order to ascertain the amount for which said secured creditor may be allowed to vote at a first meeting of the creditors of a bankrupt is not final.—*In the matter of Omsted*, 220.
11. Under General Order No. 21 of the General Orders in Bankruptcy of the Supreme Court of the United States, claims upon open accounts should contain an allegation to the effect that "no note has

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been received for such account, nor any judgment rendered thereon, if it is a fact that no note has been received.—*In the matter of Omsted* 220.

12. Under Section 11, Subdivision A. of the Bankruptcy Act of 1898, the United States District Court sitting as a court of bankruptcy has full power pending a hearing upon a petition in bankruptcy, to stay by summary process all proceedings in a territorial court affecting the property of the alleged bankrupt, where it appears that such proceedings are founded upon claims from which a discharge would be a release.—*In the matter of Lederer*, 288.
13. Pending the hearing upon a petition in involuntary bankruptcy, restraining orders will issue out of the bankruptcy court, directed to the Sheriff of the Territory, enjoining him from selling or disposing of the property of the alleged bankrupt levied upon by him under executions, issued upon judgments obtained in the territorial courts within four months prior to the filing of the petition in bankruptcy.—*In the matter of Lederer*, 288.

See JURISDICTION, 1, 2.

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BOARD OF SPECIAL INQUIRY.

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CARGO.

ADMIRALTY, II.

SHIPPING, 2, 3.

CHINESE.

1. The policy of the laws of the United States in relation to Chinese is the exclusion of all save the privileged classes.—*United States v. Kut Yong*, 104.
2. The wife of a Chinese partakes of his *status* as a laborer.—*United States v. Kut Yong*, 104.

3. Long absence in China of person of Chinese descent claiming to have been born in the United States is prejudicial to right to re-enter.—*United States v. Kam You*, 113.
4. The fact that two Chinese persons were born in the Hawaiian Islands, while the same was a monarchy known as the Kingdom of Hawaii, does not deprive them of their status as American citizens, it being proven that they were born in the Hawaiian Islands, sons of a domiciled Chinese laborer; in view of the provisions of Article 17, Section 1 of the Constitution of the Republic of Hawaii, "that all persons born or naturalized in the Islands and subject to the jurisdiction thereof, are citizens of the Republic", and of the provisions of Section 4 of the Act of Congress approved April 30, 1900, to provide a government for the Territory of Hawaii, that "all persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."—*U. S. v. Ching Tai Sai*; *U. S. v. Ching Tai Sun*, 119.
5. A Chinese woman shown to have been purchased of her mother in China for \$200, and afterwards brought to Hawaii and compelled by the respondent to lead the life of a prostitute, turning all the earnings of such vocation over to him, and who was (while not physically restrained by respondent, in such fear of him by reason of threats against her life should she go out freely) unable to leave the house where he detained her, found by the Court to be restrained of her liberty and held in a condition of slavery repugnant to the thirteenth Article of the Amendments to the Constitution of the United States.—*In the matter of Lee Chee Hing, etc.*, 434.

See ALIENS GENERALLY.

EVIDENCE, 1, 2, 3, 5, 6, II.

MARRIAGE, I.

CITIZENS.

See ALIENS, 4, II.

CHINESE, 4.

EVIDENCE, II.

HABEAS CORPUS, 3.

HAWAII, 2.

PLEADING AND PRACTISE, 7.

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COASTWISE TRADE.

See ADMIRALTY, 10.

SEAMAN, I.

COLLISION.

1. In an action against a steamer for a collision with a barkentine in the night-time, in which the barkentine was sunk with all her cargo, where it appeared from the weight of the evidence that the barkentine had all her lights burning properly, and was sailing in a southwest course when the steamer sighted her and continued on that course as was her duty under the regulations; and where it appeared from the testimony of the officer of the deck on the steamer, that he had seen the lights of the barkentine some fifteen or twenty minutes before the collision occurred, but was in doubt as to the direction in which they were moving, and who after watching the same without making any attempt to change his course or slacken the steamer's speed, finally left the deck and went down to the cabin to find the Captain, leaving no one on the deck excepting the man at the helm, and returned to the deck and blew the whistle once to call the attention of the captain, and within one minute thereafter the collision took place; and where it further appeared that no regular lookout was kept on said steamer as required by Rule 29 of the regulations for preventing collisions at sea, (Vol. 26, U. S. Stat. p. 320) and Article 24 of the Sailing Regulations (Penal Laws of Hawaii for 1897, p. 540). Held, that the collision was due to the negligence and unskillful navigation of the steamship for which the steamship and her owners are liable.—*Low v. "Claudine"; Piltz v. "Claudine"*, 50.
2. All vessels should have a competent lookout stationed in such a position that he can descry approaching vessels at the earliest possible moment; and the want of an adequate lookout on board a vessel at sea is culpable neglect on her part which will *prima facie* render her responsible for injuries received from her while in that condition.—*Low v. "Claudine"; Piltz v. "Claudine"*, 50.
3. The fact that no lookout was kept on the steamer "Claudine" was unpardonable negligence, for which there can be no excuse; and by reason of which omission to keep a look-out, aside from other reasons, the "Claudine" and its owners, under the circumstances of this case must be held responsible for the collision. *Low v. "Claudine"; Piltz v. "Claudine,"* 50.

See EVIDENCE, 4.

CONFessions.

1. Confessions freely and voluntarily made are evidence of the most satisfactory character.—*U. S. v. Miyama*, 399.

CONSTITUTIONAL LAW.

1. Upon an application for a writ of *habeas corpus* on the ground that the petitioner is deprived of his liberty contrary to the Fifth and Sixth Amendments to the Constitution of the United States, in that he had been convicted of an infamous crime without the indictment or presentment of a Grand Jury and by a verdict of less than twelve jurors, where it appeared that after the annexation of Hawaii to the United States and before the 14th day of June, 1900, when the Act of Congress for the government of the Territory of Hawaii went into effect, the petitioner was convicted in the Circuit Court of the Territory of the offense of publishing a libel in the first degree by the verdict of nine out of twelve jurors, under Section 1345 of the Civil Laws of Hawaii, and sentenced to hard labor for six months under Section 305 of the Penal Laws of Hawaii; and where by Chapter I, p. 52, Section 3 of the said Penal Laws it is provided that "felonies or crimes mean such offenses as are punishable with death or imprisonment for a longer period than two years or by the forfeiture of any civil or political right....."; and where it is further provided by Section 304 of the said Penal Laws of Hawaii, that the degree of the libel shall be found by the jury, the court or "the magistrate authorized to decide on the facts", Section 584 of the said Penal Laws giving the District Magistrate jurisdiction for the "prosecution, trial and sentence of any person charged with.....any misdemeanor," *Held*, that the offense whereof the petitioner was convicted and sentenced was a misdemeanor under the laws of Hawaii, and was not an infamous crime within the meaning of the Fifth Amendment to the Constitution of the United States.—*In the matter of Marshall*, 34.
2. The petitioner not having been accused of an infamous crime had no constitutional right to a presentment or indictment by a Grand Jury under the Fifth Amendment to the Constitution of the United States.—*In the matter of Marshall*, 34.
3. A verdict of a jury of nine out of twelve jurors was authorized by the law of Hawaii, which law in respect to this class of cases was not repealed until June 14, 1900, and after the proceedings instituted in this matter.—*In the matter of Marshall*, 34.
4. The Sixth Amendment to the Constitution of the United States applies only to trials of offenses which are triable by what is known as a common law jury, and are above the grade of misdemeanors, which latter offenses are peculiarly within the jurisdiction of magis-

trates sitting alone, and do not necessarily require a jury.—*In the matter of Marshall*, 34.

5. Upon an application to this Court for a writ of *habeas corpus* on the ground that petitioner was in custody in violation of the Eighth Amendment to the Constitution of the United States, in that he was suffering "cruel and unusual punishment" where it appeared that petitioner had been sentenced to ten days imprisonment by the Judge of the First Judicial Circuit Court of the Territory of Hawaii for contempt of court, and at the time of the application for the writ was confined in the Oahu Jail; and where it appeared that the Oahu Jail or Prison has three sections, one for persons serving terms of felonies, another for persons serving terms for misdemeanors, and the third set apart for persons held for trial or detained by order of court; and it appearing that the petitioner was detained in the third section; and there being nothing to show that petitioner is made to suffer any other or different punishment than the other misdemeanor prisoners: *Held*, that "no cruel or unusual punishment" as contemplated by the Eighth Amendment to the Constitution of the United States, has been inflicted upon the prisoner. The writ denied.—*In the matter of Bitting*, 69.
6. The presumption of law is always in favor of the constitutionality of a statute, and whenever a court entertains a reasonable doubt concerning its constitutionality, it must be resolved in favor of the statute.—*Achi v. Kapiolani Estate*, 86.
7. Chapter 64 of the Civil Laws of Hawaii, 1897, relates to taxation for local and municipal purposes only, and its provisions are not contrary to Subdivision 1, Section 8, of Article 1 of the Constitution of the United States.—*Achi v. Kapiolani Estate*, 86.
8. The provisions of Subdivision 1, Section 8, of Article 1 of the Constitution of the United States, that all taxation "shall be uniform throughout the United States" relates solely to taxation for national purposes and has no reference to local or municipal taxation in states or territories.—*Achi v. Kapiolani Estate*, 86.
9. A bill was filed to compel the defendant to specifically perform a contract to deliver a good and lawful deed to complainant of certain property, by fixing thereto the stamps required by the provisions of Chapter 64 of the Civil Laws of Hawaii (1897) which defendant had refused to do. Upon demurrer filed to said bill on the ground that the same did not state facts sufficient to constitute a cause of action against defendant, in that the said Chapter 64 was contrary to the Constitution of the United States, the same was overruled, and defendant given ten days in which to answer.—*Achi v. Kapiolani Estate*, 86.

10. Chapter 46 of the Session Laws of 1888, now known as Part V. of Chapter 41 of the Penal Laws of the Hawaiian Islands, 1897, entitled "Sale of Malt Liquors", is unconstitutional and void, and in violation of Subdivisions 1 and 3 of Section 8 of Article I and Subdivision 1, Section 2 of Article IV. of the Constitution of the United States.—*Macfarlane v. Wright*, 206.
11. No reservation was made in the Joint Resolution of both Houses of Congress annexing the Hawaiian Islands, of Articles V., VI. and VII. of the Amendments to the Constitution relating to indictments or trial by jury in common law or criminal cases,—This showed that American sovereignty not only prevailed here as elsewhere in the Territories of the United States, but that nothing could be done or permitted here contrary to the Constitution of the United States.—*In the matter of Mankichi*, 303.
12. This annexation was not in a "transition or inchoate" state, but was complete, and the constitution came with annexation, and became and ever since has been the supreme law of this territory.—*In the matter of Mankichi*, 303.
13. The finding of a true bill by a Circuit Judge of the territory or in any other manner than by the indictment of a Grand Jury properly empowered to act in the premises, is in direct violation of the provisions of Article V. of the Constitution of the United States, and any person found guilty of an infamous crime without such indictment by a Grand Jury is illegally convicted and should be released on *habeas corpus*.—*Ib.*
14. In an application for a writ of *habeas corpus* made and signed by a Chinese person on behalf of a Chinese woman, where the allegations of the petition show that the woman is forcibly detained in a house belonging to the respondent and restrained therein through fear of him and compelled by him to lead a life of prostitution; *Held* that the allegations of the petition are sufficient to give the Court jurisdiction under Subdivision 3 of Section 753 of the R. S. U. S., "or in custody in violation of the Constitution", in that such allegations show that she is held in involuntary servitude contrary to the Thirteenth Article of the Amendments to the Constitution of the United States.—*In the matter of Lee Chee Hing, etc.*, 434.
15. No form of slavery or involuntary servitude, except as a punishment for crime, can, under Article Thirteen of the Amendments to the Constitution of the United States, be lawfully permitted to exist in the Territory of Hawaii.—*Ib.*

See EMINENT DOMAIN, I.

HABEAS CORPUS, 5.

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CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, I, 7.

CONTRACTS.

See ADMIRALTY, I8.

RESTRAINT OF TRADE, I.

CORPORATIONS.

See FOREIGN CORPORATIONS, I.

CRIMINAL LAW.

1. Under the provisions of the Act of Congress of August 1, 1892, (Vol. 27, U. S. St. 340), eight hours in any one calendar day is the limit of service of laborers or mechanics on any of the public works of the United States or District of Columbia, except in case of "extraordinary emergency."—*United States v. Ohta*, 158.
2. Defendant not relieved from responsibility by showing some one else equally culpable with him.—*United States v. Ohta*, 158.
3. Circumstantial evidence. See *U. S. v. Sabate*, 315.
4. Crime rarely committed in the presence of witnesses.—*U. S. v. Sabate*, 315.
5. Presumption of innocence; reasonable doubt.—*U. S. v. Gisaburo*, 323.
6. Common law definition of murder.—*U. S. v. Gisaburo*, 323.
7. Malice; period of time during which it may exist; difference between express and implied malice.—*Ib.*
8. Distinction between murder and manslaughter.—*Ib.*
9. Manslaughter defined by Section 5341, R. S. U. S.—*Ib.*
10. A blow with a fist is no excuse in law for retaliatory use of knife.—*Ib.*
11. Where the law makes a crime a felony, any attempt to violate the law in that respect is an attempt to "feloniously" commit the specified crime.—*U. S. v. Miyama*, 399.
12. "Knowingly" to commit a crime is to go about its commission with a knowledge of what one intends to do.—*Ib.*
13. It is not necessary to prove motive for the commission of a crime.—*U. S. v. Manasse*, 250.

See Confessions, 1.

INTENT, 1.

INTERNAL REVENUE, 9.

JURISDICTION, 4.

POSTAL LAWS, 2.

WITNESSES, 3.

CUSTOMS DUTIES.

1. Upon an appeal to the United States District Court under Section 15 of the Customs Administrative Act of June 10, 1890, (26 Stats. 137) by an importer of certain articles of merchandise known as Japanese shoes or slippers, where it appeared that the only ground stated by the protestant in his notice of protest to the Collector of Customs under the provisions of Section 14 of the said Customs Administrative Act, and on the hearing had by the Board of General Appraisers at New York upon an appeal from the decision of the said Collector, was error in the classification and assessment of the said articles by the Collector, and where the decision of the Board of General Appraisers overruled the protest, but classified the merchandise under another paragraph of the Tariff Act of 1897 (Vol. 30, U. S. Stats. 193), *Held*, that protestant cannot on appeal to the U. S. District Court from the decision of said Board of General Appraisers, at New York, allege as error on the part of said Board the fact that it disregarded the provisions of Section 7 of the Tariff Act, the so-called "similitude clause". It was not possible under the language of the original protest to do this. The protestant is confined to the allegations of his protest made to the Collector of the Customs and upon which the Board of General Appraisers acted.—*In re appeal of Hamano*, 344.
2. An importer must stand on the objections raised in the original protest and cannot vary from nor enlarge them in his petition for review, or on the trial.—*Ib.*
3. It is prescribed by Section 14 of the Customs Administrative Act that the person dissatisfied with the decision of the Collector of the Customs, shall give notice to the Collector setting forth therein "specifically and distinctly.....the reasons for his objections thereto". Where that is done, such objections must stand as the error appealed from.—*Ib.*
4. While a protest is not required to be made with technical precision, yet it must show that the objections afterwards made at the trial were in the mind of the party, and were brought to the knowledge of the Collector at the time of making them.—*Ib.*

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5. The Board of General Appraisers was established to determine controversies in relation to the proper classification of articles under the Tariff Act of 1897, and the decision of such Board should not be overruled unless clearly against the weight of the evidence.—*Ib.*
6. Where on an appeal from the decision of the Collector of Customs made by an importer to the Board of General Appraisers, no evidence was offered on the part of protestant on the hearing before said Board, although due notice had been given him thereof, and the only finding of fact by said Board is as to the materials of which the articles of merchandise are composed, based upon an analysis made by the analyst in charge of the analysis of textile fabrics in the Appraisers' office, the component material of chief value being found to be not leather, but rawhide; and where said analysis showed that one of the component parts of the said merchandise was iron, *Held*, that as manufactures of rawhide are nowhere provided for in the Tariff Act of 1897, and there is no other component part of chief value, that the classification of the Board of General Appraisers as "articles or wares not specially provided for, composed wholly or in part of iron," (Par. 93 Tariff Act) is the correct one, and the decision of the said Board is affirmed.—*Ib.*

CUSTOMS ADMINISTRATIVE ACT.

See CUSTOMS DUTIES, 1, 2, 3, 4, 5, 6.

CUSTODY.

See IMMIGRATION, 1, 5, 10.

INTERNAL REVENUE, 6, 8.

DAMAGES.

1. The fundamental principle of the law of damages is that the person injured in his personal or property rights shall receive compensation therefor.—*Brown v. Davidson, 151.*
2. Elements of damage; actual losses which can be specifically stated and proven, such as loss of profits from inability to accept contracts; actual losses which can be specifically stated and proven from increased expenditures incurred in filling contracts already taken; loss and injury to an established business.—*Brown v. Davidson, 151.*
3. Damages must be reasonable and ascertainable from the facts presented in evidence.—*Brown v. Davidson, 151.*
4. Damages must be specifically stated and must be the direct, proximate and natural consequence of the contract, combination or conspiracy complained of.—*Brown v. Davidson, 151.*

See ADMIRALTY, I, 18.

DEATH, I.

EMINENT DOMAIN, 21.

EVIDENCE, 8.

NEW TRIAL, 3.

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SHIPPING, I.

DEADLY WEAPON.

- I. A butcher knife is a deadly weapon in contemplation of law.—*U. S. v. Gisaburo*, 323.

DEATH.

- I. Under the Hawaiian Statute (Section 1109, Ballou's Compiled Civil Laws of Hawaii, 1897) providing that the "common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage," and, as decided by the Supreme Court of Hawaii in 1846, in the case of *Kake v. Horton*, 2 Haw. 211, the common law rule that an action would not lie for damages for the wrongful killing of a human being, is rejected, and "damages in this class of cases may be assessed on the principle of compensation or reparation."—*Kekauoha v. Robert Lewers Co.*, 75.

See ADMIRALTY, I.

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EMINENT DOMAIN.

1. Under the Federal Constitution, private property cannot be taken for public uses without just compensation.—*U. S. v. Estate of Bishop et al.*, 179.
2. Just compensation means compensation that is just to both sides—just in regard to the public as well as to the individual.—*U. S. v. Estate of Bishop et al.*, 179.
3. Whenever private property is taken for public uses or purposes, the fair market value of the property at the time of the taking should be paid for it.—*Ib.*
4. The actual value of the property at the date of the summons is designated as the measure of valuation of all property to be condemned.—*U. S. v. Estate of Bishop et al.*, 179, 223.
5. A fair equivalent for any entire piece of property is its market value in money, which value must be shown by the usual and common means.—*Ib.*
6. What property sought to be condemned will bring at a fair public sale where one party wants to sell and another wants to buy, may be taken as a criterion of its market value.—*Ib.*
7. The probable value of land for residential purposes, or for the purposes of a public resort, cannot be considered in the absence of any evidence of residences on said land, or that the same was ever used for a public resort.—*Ib.*
8. Burden of proof is on the plaintiff to prove the value of interest of the defendant in the lands sought to be condemned.—*Ib.*

9. Knowledge obtained by the jury through a personal inspection of the lands in controversy may be used only in determining the weight of conflicting testimony as to the value of the land, but not otherwise.—*U. S. v. Estate of Bishop et al.*, 179, 223.
10. Compensation is to be estimated by the actual rights acquired by the government, and not by the use which the government may make of those rights.—*Ib.*
11. The actual value of the property to be condemned cannot be enhanced by reason of any projected improvements for which it is sought to be taken.—*Ib.*
12. Willingness or unwillingness of defendant to part with its property is not a proper element of value.—*Ib.*
13. Prospective or speculative values are not to be considered.—*U. S. v. Estate of Bishop et al.*, 179, 223.
14. The value of leases on the land to be condemned is not to be considered in arriving at the true market value of the fee in the land.—*Ib.*
15. Sworn returns of the value of said lands made to the Assessor of the Territory by the defendant are admissions against interest, and are competent evidence tending to show the market value of the property at the time of the making of said sworn returns.—*Ib.*
16. Improvements on land sought to be condemned are to be assessed separately from the value of the land itself.—*Ib.*
17. All the evidence in the case, both direct and circumstantial, must be taken into consideration, together with all reasonable inferences to be drawn from such evidence.—*Ib.*
18. The actual market value of a leasehold interest in lands sought to be condemned to a public use, must be shown by the usual and common means adopted for such purposes.—*U. S. v. Estate of Bishop et al.*, 223.
19. The value of a leasehold interest is its actual market value over and above the amount of rent of the land leased and the taxes, if the lessee has to pay the taxes.—*Ib.*
20. In placing a value upon the leasehold interest in lands sought to be condemned for a public purpose, a mere speculative or possible value of sugar that might be produced in the future on said land covered by the leasehold interest cannot be considered by the jury.—*Ib.*
21. Arbitrary or lumping methods of assessing damages for the taking of property for public purposes are to be condemned.—*Ib.*

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22. Sworn tax returns as to the value of a leasehold interest in lands sought to be condemned, made to the Assessor of the Territory by the manager of the lessee defendant in accordance with law, are admissions against interest, and are competent evidence tending to show what the lessee then believed to be the value of said leasehold interest.—*Ib.*
23. A statement of the assets and liabilities of the defendant filed by the Secretary thereof with the Treasurer of the Territory, as required by Section 2076 of the Civil Laws of the Territory, is admissible in evidence as a statement against interest.—*Ib.*
24. The value of the user to the defendant for the remaining portion of the term of its leasehold in lands sought to be condemned, of any improvements placed on said lands, may be ascertained by the jury, but must be assessed separate and distinct from the value of the leasehold interest in said lands.—*Ib.*
25. The value or cost of construction of the sugar mill, pumping stations or any of the machinery belonging to the defendant, cannot be considered unless the same were constructed or standing upon the land sought to be condemned at the time of the commencement of the action.—*Ib.*

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EQUITY.

1. The Circuit Court will assume jurisdiction in equity originally, and consider an application for an injunction where the bill of complainants alleges both the statutory amount of pecuniary injury and the fact that the Act of the Legislature of the Territory of Hawaii complained of is in violation of the Constitution of the United States, and no plea to the jurisdiction being raised on the part of the defendant.—*Macfarlane v. Wright, 206.*
2. The avoidance of a multiplicity of suits given as a ground of equitable jurisdiction is not such a multiplicity of suits as is contemplated in equity, where it appears that no one of the complainants would be subjected in any event to more than one action either to recover from him the amount of an assessment found due, under a territorial income tax law, or to recover back any moneys paid by him under color of legal process.—*Peacock et al. v. Wright et al., 294.*

EVIDENCE.

1. Evidence consisting only of the hearsay testimony of Chinese persons, and there being no white witnesses, considered inadequate to satisfy the Court of the truth of the allegations of petitioner as to birth in the Hawaiian Islands.—*In the matter of Lau Sam*, 6.
2. Where a Chinese person claims admission into the United States on the ground that he is a citizen thereof, the burden of proof is on him to prove such contention.—*In the matter of Wong Lin*, etc., 44; *United States v. Kam You*, 113.
3. The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person claiming the right to enter the United States on the ground that he was born in this country, where, as in this case, he left the Hawaiian Islands, the alleged place of birth, when he was seven years old, and did not return until after the lapse of twelve years; and especially where the testimony of the person claiming admission shows not the slightest recollection of the place where he claims to have been born or of its people; and there being no direct testimony that he was born in the Islands given even by the Chinese witnesses.—*In the matter of Wong Ling*, etc., 44.
4. The failure to produce vital evidence, which is under the exclusive control of one of the parties to the action, if not properly explained, is taken strongly against said party, especially where it attempts to introduce exhibits which seem to unfairly represent the case.—*Low v. "Claudine;" Piltz v. "Claudine,"* 50.
5. In a proceeding to deport a Chinese person found in the Territory of Hawaii without the certificate of residence required by the Act of Congress of May 5, 1892 (as amended by the Act of November 3, 1893), and the Act of Congress of April 30, 1900, providing a government for the Territory of Hawaii, the burden of proof is on said Chinese person to prove her right to remain.—*United States v. Kut Yong*, 104.
6. Unless the Court is fully satisfied of Chinese testimony, the presumption is that a Chinese person coming from China and seeking to land in this country is an alien, and not a native-born citizen.—*United States v. Kut Yong*, 104.
7. Under the provisions of Section 4282, R. S. U. S., after a loss has been shown to have arisen by fire on board a vessel, the burden of proof is on those asserting the fire was caused by the "neglect or design" of the ship-owner.—*McInerny v. Bark "C. D. Bryant,"* 124.
8. In an action to recover damages for injuries sustained through an alleged contract and agreement made contrary to the provisions of the Act of July 2, 1890, entitled "An Act to protect trade and com-

merce against unlawful restraints and monopolies," the burden of proof is on the plaintiff to show actual damage to business.—*Brown v. Davidson*, 150.

9. Hearsay testimony.—*United States v. Ohta*, 158.
10. In determining on which side the weight or preponderance of the evidence is, the jury should consider the opportunities of witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest in the result of the suit, and the probability or improbability of the truth of their several statements, in view of all the other evidence adduced on the trial.—*U. S. v. Bishop Estate et al.*, 179.
11. The means of showing that a Chinese does not come within the restricted classes is presumably under the control of the said Chinese; and where, at the time of his alleged birth in the Hawaiian Islands, there was a law making it a penal offense for any parent not to report the birth of a child for registry, and no proof of compliance with such law is introduced on behalf of petitioner, it is a very significant fact against his contention.—*In the matter of Leong Sai*, 234.
12. Under Section 3333, R. S. U. S., the burden of proof is on the claimant of the property seized as forfeited under Section 3450, R. S. U. S.—*U. S. v. The "Kawaiulani"*, 260.
13. Due care on the part of a steamship company or its agent, to prevent escape of immigrants not entitled to land in the United States, is no excuse under the law and cannot be proven.—*U. S. v. H. Hackfeld & Co.*, 329. *Ib.* 371.
14. When the government has proven to the satisfaction of the jury, the rejection of immigrants by the proper immigration officers, and notice to the steamship company or its agent thereof, the burden of proof is then on the steamship company or its agent to show due return of immigrants to the country from whence they came.—*U. S. v. H. Hackfeld & Co.*, 329. *Ib.* 371.
15. Circumstantial evidence is legal evidence; and must be acted upon in the same manner as if direct.—*U. S. v. Miyama*, 399.
16. Where a witness made certain statements out of Court to the prosecuting officers of the government, which statements resulted in the bringing of charges against the defendant for importing women into the United States for purposes of prostitution, and upon the trial when acting as a witness for the government, said witness testifies directly contrary to the statements formerly made, it is proper to introduce such prior statements in evidence, although not as proof of the facts stated.—*Ib.*

17. Upon the trial of a person upon an indictment under Section 3 of the Act of Congress of March 3, 1875, for importing women into the United States for purposes of prostitution, it is not necessary to prove the date of the offense set up in the indictment; if the offense is proven to have been committed within three years prior to the finding of the indictment, the law is satisfied.—*U. S. v. Miyama*, 399.

See ADMIRALTY, 17

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ATTORNEY AND CLIENT I.

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EMINENT DOMAIN, 7, 8, 17, 22, 23.

EXEMPTIONS.

See ADMIRALTY, 10.

GARNISHMENT, I.

SEAMEN, 3.

EXPERT TESTIMONY.

1. The evidence of experts as to values does not differ in principle from the evidence of experts on other subjects.—*U. S. v. Estate of Bishop, et al.*, 179.
2. In considering the opinions of experts, the jury is not bound to give weight to testimony which is contrary to what every person of good sense and ordinary intelligence knows to be true.—*Ib.*
3. Neither the Court nor the jury is bound by the opinions of expert witnesses unless they are in harmony with the weight of the testimony, but may consider them in connection with all the other facts in evidence.—*United States v. Bishop Estate, et al.*, 201, 223.

FEDERAL QUESTION.

See HABEAS CORPUS, 2.

FELLOW SERVANTS.

1. The master of a ship and a seaman thereon are fellow servants engaged in a common employment both in the navigation of the ship and while engaged in the loading and unloading of her cargo.—*Nawaieha v. Wilder Steamship Co., et al.*, 378.

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FELONY.

1. Where the law makes a crime a felony, any attempt to violate the law in that respect is an attempt to "feloniously" commit the specified crime.—*U. S. v. Miyama*, 399.

FOREIGN CORPORATIONS.

1. Act 45 of the Session Laws of the Legislature of Hawaii (1898) requiring all foreign corporations to file in the office of the Treasurer of the Territory a certified copy of the charter or act of incorporation of such corporation or company, names of the officers thereof, the name of some person upon whom legal notice and process from the courts of the Territory may be served and a certified copy of the by-laws of such corporation "under penalty of being deprived of the right to sue in any court of the Territory for any cause of action whatever while such refusal or neglect continues, does not apply to actions in admiralty instituted in the United States District Court of Hawaii.—*Spreckels Bros. Co. v. "Nevadan," et al.*, 354.

FORFEITURES.

1. Proceeding under Section 3450 R. S. U. S. to condemn vessel.—*U. S. v. The "Kawaiulani,"* 260.
2. Proceeding under Sections 4142 and 4143 of the Revised Statutes of the United States.—*U. S. v. Peacock*, 334.

See EVIDENCE, 12.

INTERNAL REVENUE, 9.

GARNISHMENT.

1. The wages of an engineer on board one of the steamers of the Wilder Steamship Company, plying between the Islands of the Hawaiian group, held to be exempt from garnishment, under the provisions of Section 8 of an Act of the Legislature of the Territory of Hawaii, entitled "An Act to provide for the exemption of certain personal property from attachment, execution, distress and forced sale of every description,....." passed April 24, 1901, it being admitted that he is the head of a family earning less than \$200 a month.—*Holland v. Steamship "Helene,"* 281.

See ADMIRALTY, 10.

SEAMEN, 3.

GRAND JURORS.

DUTIES OF, *See APPENDIX, 362.*

HABEAS CORPUS.

1. While a United States District Court has discretion to summarily discharge on *habeas corpus* any person restrained of his liberty under a judgment of a territorial court, yet it is only in extreme cases that the District Court will exercise such discretion; but will generally leave the petitioner to his remedy by writ of error from the Supreme Court of the United States.—*In the matter of Marshall*, 34.
2. Where no Federal question is presented for the consideration of the United States Court on an application for a writ of *habeas corpus*, said court has no jurisdiction to entertain the writ.—*In the matter of Marshall*, 34.
3. Application for a writ of *habeas corpus* applied for alleging detention by the Collector of Customs of the port of Honolulu, with intent to return petitioner to China, heard by the Court where the petition alleged that petitioner was a citizen of the United States, having been born in the Hawaiian Islands.—*In the matter of Wong Lin, etc.*, 44.
4. Where a decision of the Collector of Customs is adverse to the landing of a Chinese woman claiming admission to the Territory of Hawaii on the ground that her husband is a domiciled merchant therein, the United States District Court has no jurisdiction to hear an application for a writ of *habeas corpus*.—*In the matter of Yim Quock Leong*, 66.
5. The United States District Court of Hawaii possesses no power on *habeas corpus* to overrule the judgments of the territorial courts of Hawaii, unless it appears that the constitutional rights of the citizen are being violated.—*In the matter of Bitting*, 69.
6. After the Joint Resolution of Congress annexing the Hawaiian Islands as a part of the territory of the United States, and "subject to the sovereign dominion thereof" was passed, providing that the "municipal legislation of the Hawaiian Islands.....not contrary to the Constitution of the United States.....shall remain in force until Congress shall otherwise determine "and before the passage of the Act of Congress providing for the government of the Territory of Hawaii, the trial of a Japanese in the Hawaiian Islands for the crime of murder without the indictment of a Grand Jury, and the conviction of said Japanese of the crime of manslaughter by the verdict of less than twelve jurors under a law of the Republic of Hawaii, is contrary to the provisions of Articles V., VI. and VII., of

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the Constitution of the United States and the said Japanese is entitled to be released on *habeas corpus*.—*In the matter of Mankichi*, 303.

7. Where the petition in an application for a writ of *habeas corpus* was not signed by the party “for whose relief it was intended” but by a third person in her behalf, *Held*: that while it is true United States Courts are controlled by the provisions of the Habeas Corpus Act, which confers the power to issue this writ upon such courts, yet such a narrow construction will not be given to the Act as would prevent any person restrained of her liberty from enjoying the benefits of the Act, who, by the very circumstances of her restraint is deprived of the opportunity of signing the application in her own behalf.—*In the matter of Lee Chee Hing, etc.*, 434.
8. Section 760 of the Revised Statutes of the United States contemplates the possibility that some third party might make the application for the writ, on behalf of the person restrained or deprived of his or her liberty; and said Section must be considered in connection with Section 754.—*In the matter of Lee Chee Hing, etc.*, 434.
9. Where a Chinese detains a woman whom he claims as his wife and restrains her of her personal liberty forcing her to lead a life of prostitution, *Held*, that even if a marriage had been shown to exist between said Chinese and said woman, this would not give him the right to deprive her of her personal liberty and she could have recourse to the writ of *habeas corpus*.—*In the matter of Lee Chee Hing, etc.*, 434.

See ALIENS, 4, II.

CONSTITUTIONAL LAW, 1, 2, 5, 13.

EVIDENCE, II.

HAWAII.

1. The territorial Stamp Act passed by the Legislature of the Kingdom of Hawaii, in 1876, and now known as Chapter 64 of the Civil Laws of Hawaii (1897) was not repealed by the Act of Congress passed for the government of the Territory of Hawaii, and its provisions are now in full force and effect.—*Achi v. Kapiolani Estate*, 86.
2. The framers of Article 17, Section 1 of the Constitution of the Republic of Hawaii and of the Act of Congress providing a government for the Territory of Hawaii (Section 4 thereof) approved April 30, 1900, intended to refer to the geographical limits of the Hawaiian Islands rather than to any political conditions existing therein; and that Hawaiian and American citizenship was to be extended to all persons born in the Islands, excepting only those “born of persons

engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence by a fiction of public law is regarded as a part of their own country."—*U. S. v. Ching Tai Sai*; *U. S. v. Ching Tai Sun*, 118.

3. Part V. of Chapter 41 of the Penal Laws of Hawaii (1897) entitled "Sale of Malt Liquors," which provides for the levying of an annual license tax of \$250 for the privilege of selling beer manufactured in Honolulu to the exclusion of all other spirituous or malted liquors under said license, is a discrimination in favor of the citizens of the Territory of Hawaii and against the manufacturers of foreign brewed beers in violation of Subdivisions 1 and 3 of Section 8 of Article I, and Subdivision 1 of Section 2 of Article IV. of the Constitution of the United States.—*Macfarlane v. Wright*, 206.
4. The legislature of Hawaii has the general power to legislate upon all questions of taxation in relation to providing a local system of revenue to carry on the government of the Territory of Hawaii, the only limitation being that such legislation shall not be "inconsistent with the Constitution and laws of the United States locally applicable", and where said legislature has enacted a local income tax law, the United States District Court will not interfere by injunction to restrain the collection of taxes assessed under said law. where complainants have an adequate remedy at law.—*Peacock v. Wright, et al.*, 294.
5. The Organic Act passed by Congress for the government of the Territory of Hawaii is the fundamental law of the territory; and by the provisions of that Act the legislative power of the territory is extended to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, locally applicable." —*Peacock et als. v. Wright et al.*, 294.
6. Congress provided by a Joint Resolution of Annexation of both Houses, dated July 7th, 1898, that the "municipal legislation of the Hawaiian Islands.....not contrary to the Constitution of the United States.....shall remain in force until the Congress of the United States shall otherwise determine." By this Joint Resolution Congress in the plenary power conferred upon it, provided that all municipal legislation of the Republic of Hawaii contrary to the Constitution of the United States should be repealed, leaving in force all that was not in conflict with it. No language could be plainer.—*In the matter of Mankichi*, 303.

See ALIENS, 1, 2, 3, 4, 6.

CHINESE, 4.

CONSTITUTIONAL LAW, 7.

FOREIGN CORPORATIONS, 1.

TREATIES, 1.

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HUSBAND. AND WIFE.

1. It is settled law that a husband cannot detain his wife against her will.—*In the matter of Lee Chee Hing, etc.*, 434.

See CHINESE, 2.

IMMIGRATION.

1. The custody of immigrants after examination by proper inspection officers and decision adverse to their landing is in the steamship company or its agent bringing such immigrants into the country.—*U. S v. H. Hackfeld & Co.*, 329.
2. It is the duty of the steamship company or its agent after notification of the rejection of any immigrant, to deport such immigrant to the country from whence he came.—*U. S. v. H. Hackfeld & Co.*, 329.
3. If, after rejection by the proper immigration officers, and pending deportation, an immigrant escapes into the country, the steamship company or its agent is liable under the law.—*U. S. v. H. Hackfeld & Co.*, 329.
4. Nothing will excuse the steamship company or its agent for escape of rejected immigrants, but what is known as *vis major*, or inevitable accident.—*U. S. v. H. Hackfeld & Co.*, 329, 371.
5. The legal custody of alien immigrants is in the ship bringing them to this country, until the final completion of the examination of such alien immigrants by the proper inspection officers, notwithstanding they may have been removed from the ship for the purposes of such examination.—*U. S. v. H. Hackfeld & Co.*, 371.
6. The temporary removal for purposes of inspection provided for by the statute is simply for the convenience of the shipping people and to prevent delay in the completion of the voyage of the vessel to its terminal point; and in the language of the statute, such "temporary removal shall not be considered a landing pending such examination."—*Ib.*
7. Alien immigrants are treated as being still on board the vessel, and until they are declared to be lawfully entitled to enter the United States, the responsibility for their safe keeping is with the vessel or its agent.—*Ib.*
8. The vessel or its agent cannot avoid responsibility by claiming or proving that any officer or employe of the United States assumed to look after these alien immigrants.—*Ib.*
9. If pending an examination and inspection by the proper officers, any alien immigrant escapes into United States territory, such escape

is "a negligent landing.....at a time and place other than that designated by the inspection officers" within the meaning of Section 8 of the Act of March 3, 1891, relative to alien immigrants, etc.—*Ib.*

10. After alien immigrants have been examined by the proper inspection officers and a decision adverse to their landing has been arrived at, the custody of such immigrants continues in the ship or its agents; and it is the duty of the ship or its agent, after notice of the rejection of such alien immigrants to deport them to the country from whence they came.—*Ib.*
11. If, after rejection by the proper inspection officers and pending deportation, any alien immigrant escapes into United States territory, then the said ship or its agent is liable under Section 10 of the Act of March 3, 1891, relative to alien immigrants, etc.—*Ib.*
12. The decision of the Board of Special Inquiry provided for by the Act of March 3, 1903, giving certain alien immigrants the right to land in the Territory of Hawaii, is not a bar to an action to recover the penalty for the unlawful bringing of said alien immigrants into the country, under Sections 4 and 5 of the Act of March 3, 1903, regulating the immigration of aliens into the United States (Vol. 32, Part 1, U. S. Stats. 1213).—*Berger v. Bishop*, 405.
13. Review of immigration laws of the United States supplementary to Sections 2158-2164, R. S. U. S.—*Ib.*

See ALIENS GENERALLY.

EVIDENCE, 13, 14.

INDICTMENT.

1. Under Section 3244 R. S. U. S.—*United States v. Kawasaki*, 148.
2. To warrant a conviction upon an indictment under Act of Congress of August 1, 1892, relating to limitation of hours of daily service of laborers and mechanics employed upon the public works of the United States and District of Columbia, the act complained of need not be proven to have been committed on the day named in the indictment.—*United States v. Ohta*, 158.

3. *See CRIMINAL LAW, 1.*

INFORMERS.

1. It is the right and duty of every citizen to report to the proper officers, any violations of law that come to his knowledge, and the fact that a person does so report, does not in any manner affect his credibility as a witness unless it appears that he has some interest in

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a penalty to be recovered in the action, or is to receive some compensation from the parties in interest.—*U. S. v. Castanha*, 252.

IGNORANCE.

- I. Of law no excuse; foreigner must obey the laws which he is presumed to know.—*United States v. Ohta*, 158.

INJUNCTION.

See BANKRUPTCY, 7, 12, 13.

EQUITY, I.

HAWAII, 4.

INTENT.

- I. Shown by commission of prohibited act.—*U. S. v. Ohta*, 158.
2. A wilful doing, when used in the language of the penal statutes, is the doing with an evil intent, without a reasonable belief that the doing of the act is lawful.—*U. S. v. Miyama*, 399.
3. In considering the question of intent, a jury has the right to take into consideration, in a trial upon an indictment for bringing a woman into the United States for purposes of prostitution, the kind of place the woman was taken to on arrival in the country, character of practices engaged in by her, and whether such practices were with knowledge and consent of defendant.—*Ib.*

See INTERNAL REVENUE, 9.

INTERNAL REVENUE.

- I. By Section 3242 of the Revised Statutes of the United States a special tax is required for the privilege of carrying on the business of a retail dealer in liquors. *U. S. v. Kawasaki*, 148.
2. Retail dealer in liquors defined by Section 3244, 4th subdiv. R. S. U. S. —*U. S. v. Kawasaki*, 148.
3. The words "otherwise than as hereinafter provided" found in subdivision fourth of Section 3244 R. S. U. S. have been held by the Supreme Court of the United States to refer to wholesale liquor dealers in distilled spirits, wholesale and retail dealers in malt liquors, brewers and others who are either exempt from taxation or pay a different tax.—*U. S. v. Kawasaki*, 148.

4. When a person obtains spirituous or malt liquors which he intends to sell again in small quantities to any one who wishes to purchase the same, or who, having spirituous or malt liquors on hand intends to sell the same to any person who may apply for the same in small quantities, or, in the language of the statute, "in quantities of less than five gallons," he must pay the special tax required by the government, and any failure to do so is a violation of the law.—*U. S. v. Kawasaki*, 148.
5. Definition of distiller, see Section 3247 R. S. U. S.—*U. S. v. Castanha*, 252.
6. Upon the trial of a person indicted under Sections 3258 and 3260 R. S. U. S., it is not necessary to show actual distilling; it is sufficient if possession, custody and control of a still or distilling apparatus set up is shown.—*Ib.*
7. It is not necessary to prove a sale of spirits to warrant a conviction under Sections 3258 and 3260 R. S. U. S.—*Ib.*
8. Where the evidence showed that certain persons had in their custody, possession or control, on their premises, a still or distilling apparatus, and distilled spirits not packed in the usual commercial packages or stamped as required by law are also found thereon, and there was also on said premises together with said still and distilled spirits, *ti* roots which had been subjected to fermentation, notwithstanding that the parts of the still were scattered about the premises, there is a strong presumption that the said persons had a still set up and that they had been engaged in distilling without first fulfilling the requirements of the law.—*Ib.*
9. In a proceeding to condemn as forfeited under Section 3450 R. S. U. S., the schooner "Kawaiulani," for being used in the removal of certain distilled liquors whereon a U. S. revenue tax was imposed where such liquors were found concealed on said vessel, and it appeared that the same were deposited and secreted thereon by the captain therof, acting under a verbal lease from the owners and admitted to be rightfully in the possession of said vessel, and who admitted to the Collector of the Internal Revenue that he knew it was contrary to the laws of the United States to manufacture distilled spirits where the tax was not paid to the Internal Revenue Department, and it appearing that no taxes have ever been paid in these islands to that department on this class of liquors, *Held*, that the intent of the captain of said vessel to defraud the government of the United States of the tax imposed on such liquors is clear, and by depositing and concealing the same on said schooner, a forfeiture of said vessel was worked.—*U. S. v. The "Kawaiulani,"* 260.

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JURISDICTION.

1. The territorial courts and the District Courts of the United States do not have co-ordinate or concurrent jurisdiction in bankruptcy.—*In the matter of Voeller*, 191.
2. A Referee in bankruptcy has no jurisdiction to issue a subpoena to the bankrupt before the day set by the order of the Court for the bankrupt to attend before the Referee; and the action of the Referee in vacating such a subpoena issued by him before such day, was proper. *In the matter of Omsted*, 220.
3. Jurisdiction in admiralty for damages for a tort, does not depend alone upon the locality where the injury was inflicted, but rather upon all of the facts of the case including the locality. That is to say, it must occur upon the vessel on the high seas or in the tide-waters and arise out of some privity between the injured man and the officers or owners of the ship. And where no such condition is shown to exist by the libel, an exception thereto on the ground of lack of jurisdiction will be sustained.—*Campbell v. H. Hackfeld & Co.*, 319.
4. The jurisdiction of the United States District Court of Hawaii established where alleged crime shown to have been committed on the high seas on a vessel registered under the United States laws, and owned by an American corporation; and that the port of Honolulu was the first place to which the vessel came after the commission of the alleged crime.—*U. S. v. Gisaburo*, 323.
5. The United States District Court of Hawaii has jurisdiction to entertain a motion to strike out parts of an answer.—*U. S. v. Peacock*, 334.

See ALIENS, 4.

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JURY.

1. Race prejudice is not to be entertained by the members of the jury on the trial of a Japanese for the murder of a white man.—*U. S. v. Gisaburo*, 323.

2. In considering question of intent, the jury has a right to take into consideration, in a trial upon an indictment for bringing a woman into the United States for purposes of prostitution, the kind of place the woman was taken to on arrival in the country, character of practices engaged in by her and whether such practices were with knowledge and consent of the defendant.—*U. S. v. Miyama*, 399.
3. While a jury can not act upon material facts resting only within its private knowledge, but must be controlled by the evidence adduced, the members of the jury should yet judge of the weight and force of the evidence by their own general knowledge of the subject.—*U. S. v. Estate of Bishop, Deceased, et als.*, 223.

See EMINENT DOMAIN, 9.

NEW TRIAL, I.

LACHES.

Where an injured seaman was left in a hospital in the City of Honolulu, the vessel on which he was injured proceeding on her voyage and not returning to that port until nine and a half months thereafter, the seaman during all of that time being confined in said hospital undergoing treatment for his injuries, *Held*, that an action instituted by him immediately upon return of said vessel was in sufficient time, and no *laches* was shown.—*Langaas v. Barkentine "James Tuft"* 420.

LEASES.

See EMINENT DOMAIN, 14, 18, 20, 24.

LEGISLATURE

- I. Nothing is better settled than that the legislature of a state or a territory cannot constitutionally enact laws discriminating in favor of its own citizens and against the citizens of another state or territory of the United States.—*Macfarlane v. Wright*, 206.

See HAWAII, I. 4.

TERRITORIES, I, 2, 3.

LIBERTY.

- I. Every person under the Constitution and laws of the United States is entitled to the enjoyment of personal liberty; of the right to go where one pleases and to do all that is necessary in the conduct of one's affairs, restrained only so far as one infringes upon the rights or the welfare of others.—*In the matter of Lee Chee Hing, etc.*, 434.

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LIQUOR LICENSES.

See HAWAII, 3.

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See COLLISION, 1, 2, 3

MALICE.

1. The word maliciously does not involve anything more than a wanton or wilful disregard of right.—*U. S. v. Manasse*, 250.

See CRIMINAL LAW, 7.

MANSLAUGHTER.

See CRIMINAL LAW, 8, 9.

MARRIAGE.

1. The fact that a marriage ceremony according to American or Christian customs is performed after the arrival of a Chinese woman in United States territory does not alter her status so far as her right to enter the country is concerned, under the Chinese Exclusion Laws; her *status* when she reached the Islands is the *status* which the Court must alone take into consideration in deciding upon her right to remain.—*United States v. Kam You*, 113.

See ALIENS, 10.

CHINESE, 2.

MASTER AND SERVANT.

1. A sugar plantation company held responsible for the careless and negligent acts of its servant while engaged in the prosecution of its works, resulting in injury to a third party.—*Palapala v. Paauhau Plantation Co.*, 387.

MOTIVE.

See CRIMINAL LAW, 13.

MOTION TO DISMISS.

See ADMIRALTY, 13.

MURDER.

See CRIMINAL LAW, 6, 8.

NEGLIGENCE.

1. In the presence of great and unforeseen danger, no man is expected to act with deliberation.—*Kekauoha v. Robert Lewers Co.*, 75.
2. Negligence need not be intentional; inattention may be and often is, the strongest evidence of negligence.—*Kekauoha v. Robert Lewers Co.*, 75.
3. Ordinary care has relation to the situation of the parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention.—*Kekauoha v. Robert Lewers Co.*, 75.
4. The degree of care to be used is proportioned to the danger to be apprehended of inflicting an injury upon others.—*Kekauoha v. Robert Lewers Co.*, 75.
5. Where a five-eighths of an inch chain broke in lowering a piece of casting weighing 25,000 pounds and no explanation is offered for the breaking of the chain, and it is in testimony that it is more dangerous to use a chain than a rope in this class of cases, *Held*, that it was the duty of the officers and men of the schooner under the circumstances of this case, to have used the very best and strongest appliances known to the business, and it was negligence to have used any doubtful or uncertain appliances or any rope or chain of doubtful strength.—*Kekauoha v. Robert Lewers Co.*, 75.
6. While the theory that every man must look out for himself prevails in so far that he shall not deliberately place himself in the way of injury, yet the law contemplates that every man, in his relation towards others, shall conduct himself with reasonable care and prudence, no matter what the imprudence of others may be; and if, by so conducting himself, he can avoid injury to the person or property of another, he is liable for any injury resulting from a neglect to exercise such reasonable care and prudence.—*Lorenzen v. I. I. S. Nav. Co.*, 267.
7. While it is true that in moments of great personal peril a man may, under the excitement of the moment, fail to act with the cool, deliberate judgment that may characterize him in the ordinary occurrences of life, but under the stress of excitement may do exactly the reverse of that which is best for his safety, yet courts do not as a rule, treat such conduct as contributory negligence.—*Lorenzen v. I. I. S. Nav. Co.*, 267.

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8. Where warnings are claimed to have been heard by the party injured and disregarded, thus showing a degree of negligence on his part, that would not have relieved the defendant from the results of its own negligence if by the exercise of reasonable care it could have avoided the consequences of the negligence of the injured party.—*Ib.*
8. The greater the danger, the greater the care required of the winch-man in the exercise of his control over the machinery in his charge.—*Palapala v Paauhau Sugar Plantation Co.*, 387.
9. A person of ordinary intelligence will not purposely expose himself to danger.—*Ib.*
10. A master of a vessel held guilty of gross negligence in failing to take injured seaman to the nearest port for surgical aid, after he had been injured in the service of the vessel.—*Langaas v. Barkentine "James Tuft,"* 420.
11. Master of ship held guilty of negligence in failing to put into the nearest port for surgical aid for a seaman who fell and broke his leg while engaged in the service of the ship.—*Shirrmacher v. Ship "Eskine M. Phelps,* 444.

See ADMIRALTY, 14.

COLLISION, I, 3.

IMMIGRATION, 9.

MASTER AND SERVANT, I.

SEAMAN, 4, 5.

SHIPPING, 2.

NEW TRIAL.

1. In an action to condemn the leasehold interest of the defendant in certain lands desired by the United States, where the jury returned a verdict allowing damages in the sum of \$105,000, as the value of a leasehold interest and improvements of defendant placed on the lands, on a motion for a new trial on the ground that the valuation was excessive, *Held*, that the verdict was excessive and new trial granted unless defendant elects to remit the sum of \$30,000, and accept sum of \$75,000 in full compensation for all damages.—*United States v. Bishop Estate, et al.,* 201.
2. Where no rule of law has been violated, a new trial will not be granted after two concurring verdicts, if the questions to be tried depend wholly on matters of fact, although the verdict is in the judgment of the court, against the weight of the evidence.—*U. S. v. Bishop Estate, et al.,* 258.

3. Where a verdict of \$105,000 damages was set aside and a new trial granted in an action to condemn a leasehold interest in 561.2 acres of land desired by the United States for the purposes of a Naval Station, upon the failure of the defendant in pursuance of the order of the court to elect to remit \$30,000 from the amount of the said verdict; and upon the second trial of said action the jury rendered a verdict for practically the same amount assessed at the former trial, a motion for a new trial on the part of plaintiff denied, although the Court held that it was discretionary with it to again set aside the verdict under the circumstances of the case, and grant a new trial upon the same terms as in the first trial of the action.—*U. S. v. Estate of Bishop, et al.*, 258.

OKOLEHAO.

1. Okolehao has a definite meaning in the Territory of Hawaii as belonging to a special intoxicating liquor distilled from the *ti* root, and where it was shown in a proceeding under Section 3450 R. S. U. S. that the okolehao seized therein was obtained somewhere in the mountains on the other side of the Island of Oahu, near a place called Kahana, the presumption is that it was made in the Islands.—*U. S. v. The "Kawaiulani,"* 260; *U. S. v. Castanha,* 252.

OPINIONS.

See EXPERT TESTIMONY, 2, 3.

SALVAGE, 6.

PENALTIES.

See ALIENS, 12.

PERSONAL INJURIES.

See ADMIRALTY, 7, 8, 14, 15.

SEAMEN, 5, 7.

PLEADING AND PRACTICE.

1. A demurrer to the jurisdiction sustained and the action dismissed where it appeared upon the face of the complaint, that the only ground for bringing an action for damages in the Federal Court were the facts that the plaintiff was "a citizen of the United States of America and that his permanent place of abode is in the City and County of San Francisco, State of California," and that the defendant is a citizen of the Territory of Hawaii.—*Avery v. King,* 12.

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2. In the absence of any law of the Territory of Hawaii, or of any rule either of the courts of the Territory or of this Court, declaring that in actions of eminent domain the answers shall be unverified, it is within the power of the Court to require that verified answers shall be filed to the verified petition or complaint, in conformity to the usual and uniform rule of pleading that when a complaint or petition is by law required to be verified, a verified answer shall be made thereto.—*U. S. v. Estate of Bishop, et al.*, 140.
3. The oath of defendant to the allegations of his answer is quite as much in the interest of the enforcement of public justice as the oath of the plaintiff to his petition.—*U. S. v. Estate of Bishop, et al.*, 140.
4. Where a motion to strike out certain portions of the answers of defendants was granted, and certain defendants instead of striking out the objectionable matters and filing the original answers as amended, filed new and different answers consisting of a general denial unverified, with a notice of what the defense would be forming a part of said answers, a motion to strike out said amended answers so-called, from the files, granted with leave to defendants to file the original answers re-engrossed and verified to conform to the original order of the Court.—*U. S. v. Estate of Bishop, et al.*, 140.
5. Where the allegations of the petition relate to matters peculiarly within the knowledge of the defendant, he cannot deny the same upon the ground of lack of information or belief upon the subject; and if he does so, such denials will be stricken out of the answer on motion.—*U. S. v. Peacock*, 334.
6. A defendant cannot in his answer deny knowledge of his own acts; on the contrary he is presumed to know what he does.—*Ib.*
7. Every man is presumed to know of what country he is a citizen and he cannot rest a denial to a material fact upon the ground that he does not know of what nation he is a citizen.—*Ib.*
8. A plea in estoppel does no more than deny the plaintiff's legal right to bring the action, without denying or admitting the allegations of the complaint.—*Berger v. Bishop*, 405.
9. A plea in bar held to be a plea in estoppel in the case under consideration.—*Ib.*
10. Allegations in petition for writ of *habeas corpus* held sufficient to give the United States District Court jurisdiction to hear the application under Subdivision 3, Section 753 R. S. U. S.—*In the matter of Lee Chee Hing, etc.*, 434.

See CONSTITUTIONAL LAW, 9.

EQUITY, 2.

JURIDITION, 3, 5.

NEW TRIAL, 1, 2, 3.

U. S. COURTS, 2, 5.

PLEAS.

See PLEADING AND PRACTICE, 8, 9.

POSTAL LAWS.

1. It is the policy of the government of the United States to protect all people therein from illegal or improper handling of the mails.—*U. S. v. Sabate*, 315.
2. A letter carrier is bound to deliver letters or mail in the condition in which he received the same without any delay or detention save that necessarily incident to his employment.—*Ib.*
3. Indictment under Section 3869, R. S. U. S. for "maliciously and wilfully assaulting letter carrier when in uniform, while in the discharge of his duty as a letter carrier."—*U. S. v. Manasse*, 250.

PRESUMPTIONS.

1. A man is presumed to know the result of his own acts.—*U. S. v. Miyama*, 399.

See ATTORNEY AND CLIENT, 1.

CONSTITUTIONAL LAW, 6

EVIDENCE, 6.

INTERNAL REVENUE, 8.

OKOLEHAO, 1.

PLEADING AND PRACTICE, 7.

PRIVITY.

See JURISDICTION, 4.

PROSTITUTION.

1. In order to sustain a charge of importation of a woman for purposes of prostitution, it must be shown beyond a reasonable doubt, that at

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the time of the importation by the defendant it was his purpose that the woman should engage in prostitution in the United States.—*U. S. v. Miyama*, 399.

2. In attempting to prove that a certain house is a house of prostitution it is permissible to show that it is located among houses having a general reputation of that character; or that it is known in the community as a house of ill fame.—*Ib.*
3. The port of Honolulu is a port of the United States and the importation of women therein for purposes of prostitution, is an importation into the United States.—*Ib.*

See SLAVERY, 2.

PROTEST.

See CUSTOMS DUTIES, 1, 2, 3, 4, 5, 6.

PROXIMATE CAUSE.

See SHIPPING, 2.

RES GESTAE.

See SALVAGE, 8.

RESTRAINT.

- I. Liberty may be restrained by threats as well as by forcible action if the power exists to enforce the threats.—*In the matter of Lee Chee Hing, etc.*, 434.

RESTRAINT OF TRADE.

- I. A contract, combination or conspiracy in restraint of trade under the Act of Congress of July 2nd, 1890, is one wherein two or more parties agree, either in writing or verbally, either as individuals or as members of an association, not to sell to or purchase of, or employ or accept employment from, any person not a member of such association, combination, or conspiracy, or a party to such contract, with the intent to exclude and prevent from purchasing from, selling to, making contracts for work with, or hiring as workers, any and all persons not a member of such association, combination or conspiracy or a party to such contract.—*Brown v. Davidson*, 151.

SALVAGE.

1. A steel sailing ship having a registered tonnage of 1447 tons net found by the court to be of the value of \$65,000 before being damaged and having a valuable cargo, went ashore upon a coral reef encircling Diamond Head, about six miles from the Port of Honolulu, on the 8th day of August, 1900, at about 9:40 a. m., and remained on said reef until 4:10 p. m. of the ninth day of August, 1900, when through the combined efforts of two steam tugs and a United States Government cutter, she was pulled off the reef after sustaining damages rendering necessary repairs estimated to cost \$25,000 and a loss of cargo jettisoned of the value of \$1259.40. \$12,000 award to three vessels for salving ship valued at \$40,000 after cost of repairs and on \$54,366.59 value of cargo and freight saved.—*Spreckels & Bros. Co. v. "Dunreggan" et al.*, 19.
2. Where valuable services were rendered by a U. S. government cutter in conjunction with two steam tugs in rescuing a steel sailing vessel together with her cargo from a position of great peril on a coral reef and an award of \$12,000 in full of all salvage in the case is decreed, *Held*, that the government cutter would have been entitled to \$3,000 of the said award had it made any claim for salvage services, but not having done so, said \$3,000 inured to the salved vessel and her cargo.—*Spreckels & Bros. Co. v. "Dunreggan" et al.*, 19.
3. The master of a vessel is entitled to some compensation for services rendered by him personally, held to be salvage services, notwithstanding the settlement of the vessel on a towage basis for her services.—*Spreckels & Bros. Co. v. "Dunreggan" et al.*, 19.
4. For the saving of life there is no salvage, and under the circumstances of this case it was not necessary in order to entitle libellant to salvage that some one should lose his life or be in imminent peril, of doing so; if the salvors did all they could to save the ship, and at the same time avoid the danger which a loss of the ship would cause to the men on board, they were entitled to fair and liberal compensation in the event of success.—*Spreckels & Bros. Co. v. "Dunreggan" et al.*, 19.
5. In determining the award to salvors, each case depends largely on its own merits; but it is clear in determining the award, several elements are to be considered; among them are the enterprise and risk of the salvors and value of the property risked; the time occupied in the rescue of the wrecked vessel; the danger and distress from which the property is rescued; the success of the efforts of the salvors and the value of the property saved.—*Spreckels & Bros. Co. v. "Dunreggan" et al.*, 19.
6. No subsequent opinions of the officers of a wrecked vessel looking backward as to what they might possibly have done to save the vessel,

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but which they did not do, can in anywise disparage or under value what was done by the salvors.—*Spreckels & Bros. Co. v. "Dunreggan"* et al., 19.

7. If a vessel is in danger of loss or deterioration at the time services are rendered to her by placing her in a position of safety, then it is a case for the award of salvage.—*Hind v. Brigantine "Consuelo"*, 97.
8. Where a large freight steamer is stranded on a coral reef in the harbor of Honolulu for two hours and a half and is finally relieved from her peril through the efforts of a steam tug, and said steamer slips off the reef into deep water and starts out to sea dragging the tug (which is still attached to her by the hawser,) stern foremost; *Held*, that this was a part of the *res gestae* and was a danger incurred by the salving tug which should be considered in estimating the character of the salvage services rendered.—*Spreckels & Bros. Co. v. "Nevadan"*, et al., 359.
9. No vessel lying on a reef is in a position of safety; and it is not necessary to constitute a salvage service that the distress in which a vessel is in should be immediate or the danger absolute. It is sufficient, if at the time the assistance is rendered, the vessel has encountered any misfortune or danger which might possibly expose her to serious injury.—*Ib.*

SCURVY.

See SEAMEN, 2.

SEAMEN.

1. A Chinese seaman already domiciled in the United States and shipping on board an American vessel as a seaman in an American port, and arriving at an American port on board such vessel, in the usual course of commerce on the sea, from such American port, is not a Chinese immigrant under the Chinese Exclusion laws.—*In the matter of Ah Sing*, 15.
2. In an action admiralty *in rem* based on Section 4568 of the R. S. U. S., as amended by the Act of December 21, 1898, where it was shown that a schooner bound on a voyage from New York to the Island of Mauritius, and from thence to Port Townsend in the State of Washington as her port of destination, put into the Port of Honolulu, with two members of the crew suffering from an illness in the nature of scurvy or *beri-beri*, and where it is claimed that such illness was the result of a lack of proper provisions and of the usual anti-scorbutics which the statute required to be provided for each member of the crew daily; and where it was shown that forty days out from Mauritius, the members of the crew were compelled in order to supply themselves with fresh drinking water, to gather rain water from the deck of the vessel, and it being further shown that it was

the intention of the Captain when he left Mauritius to sail directly to Port Townsend; *Held*, that the fact that immediately after reaching the port of Honolulu, the Captain of the schooner made a large requisition for supplies, including both food, water and anti-scorbutics, was strong proof that the ship had been insufficiently provisioned for her voyage, and that there had been a shortage in the rations of the men.—*Hall et al. v. Schooner "Howe"*, 238.

3. By the Act of February 18, 1895, Vol. 28, U. S. Stats. 667, the provisions of Section 4536 R. S. U. S., which exempt the wages due or accruing to any seaman "from attachment or garnishment in any court" are made applicable to all seamen engaged in the "coastwise trade" who ship before a U. S. Shipping Commissioner.—*Holland v. Steamship "Helene"*, 281.
4. The master of a ship and a seaman thereon are fellow servants engaged in a common employment both in the navigation of the ship and while engaged in the loading and unloading of her cargo; and each assumes the risk of the other's negligence in the discharge of the duties incident to this common employment.—*Nawaieha v. Wilder Steamship Co. et al.*, 378.
5. The owner of a steam vessel is not responsible in damages for personal injuries sustained by a seaman through the negligent giving of an unauthorized signal by the master of the ship, where by a sling load of sugar was allowed to prematurely descend into a boat without warning to the seaman, thus injuring him; where no allegation is made in the libel of neglect on the part of the owner of the vessel in the selection of a proper person as master of the ship, or of any other breach of positive duty from which the injury might have resulted.—*Ib.*
6. The maritime law is sensitive as to the rights of seamen, and rigorous in providing for their protection. When injured in the service of the ship, or disabled by illness while in such service, they are entitled to be cared for and cured if possible, at the expense of the ship; and where that duty is not performed, and a seaman suffers from the neglect, the ship is liable in consequential damages for the suffering and pain caused by such failure.—*Langaas v. Barkentine "James Tuft"*, 420.
7. Where on a voyage from Newcastle in the Colony of Australia, to Honolulu, in the Territory of Hawaii, a seaman was seriously injured by having his thigh broken, and on the twelfth day after the accident the vessel was within sixty miles of Papeete in the Island of Tahiti a well known and settled French Colony, where it was reasonable to suppose medical and surgical aid were obtainable, but the Captain of the vessel failed to put into such port proceeding instead on his voyage to Honolulu, which he reached nearly three weeks thereafter,

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and where he placed the injured man in the U. S. Marine Division of the Queen's Hospital, the seaman being confined in said hospital for a period of nine and a half months, undergoing two severe surgical operations on the injured leg, and being shown at the trial to be a cripple unable to walk without the aid of a cane, which condition is due according to the testimony of leading physicians to the bone being allowed to go without proper surgical treatment, *Held*, that the master of the vessel was guilty of gross negligence in failing to take libellant to Papeete, on the Island of Tahiti, the nearest port, for surgical aid after he had been wounded in the service of the ship, for which negligence libellant has an additional and different cause of action against the vessel, which is liable in consequential damages.—*Ib.*

8. Where an injured seaman was left at a hospital in the city of Honolulu, the vessel on which he was injured proceeding to her port of destination and not returning until nine and a half months thereafter, the seaman during all of that time being confined to a hospital undergoing treatment for his injuries, an action instituted by him immediately upon the return of the vessel is in due time and no laches is shown.—*Ib.*
9. It is a well known principle of admiralty law that when a seaman is discharged before the commencement of the voyage, he is entitled not alone to his wages but to a reasonable measure of damages, for which the owners of the vessel are liable.—*Gourley, et al. v. Matson Navigation Co.*, 429.
10. A seaman who is injured while in the service of the ship is entitled to medical care and nursing and to a cure if possible, at the expense of the ship, and all reasonable measures must be taken to that end. *Schirrmacher v. The Ship "Erskine M. Phelps"*, 444.
11. Where a seaman in the performance of his duty, and without fault on his part, is injured in the service of the ship, and there is no one aboard the ship competent to treat the injury, it is the positive duty of the master of the ship to take him to the nearest port where proper medical or surgical treatment can be obtained, and the failure of the master to do so is negligence for which the ship and its owners are liable.—*Ib.*
12. Where a seaman is incapacitated for work through injuries received while in the service of the ship, he is entitled to his full wages to the termination of the voyage.—*Ib.*

See ADMIRALTY, GENERALLY.

ALIENS, 5.

SALVAGE, 3.

SHIPPING.

1. The husband of libellant, a drayman, while assisting in the unloading of a heavy bed plate weighing some 25,000 pounds from the schooner Robert Lewers, owned by the libellee was killed. While the bed plate was being unloaded from the vessel, and was suspended in the air by means of a block and tackle under the exclusive control of the officers and men of the schooner, a small iron chain broke which caused the bed plate to swing round to the side of the vessel up which the libellant's husband was endeavoring to climb in order to avoid the swinging plate when it caught and killed him. *Held*, that his death was due to the breaking of the small iron chain, and was the result of the negligence of the officers and men of the vessel for which the vessel was liable.—*Kekauoha v. Robert Lewers Co.*, 75.
2. Where it was shown that a bark when it left its home port was in perfect seaworthy condition, well equipped, manned and provisioned for her voyage, but when moored to the wharf at Honolulu, took fire in the night time and it was found necessary to scuttle the vessel and allow her to partially fill with water in order to extinguish the said fire, by reason of which facts the cargo, including the merchandise of libellant, was seriously damaged to the injury of libellant; and where it was shown that the fire arose through the negligence of the ship's officers in leaving an open hatch leading to the hold wherein was stored liquors covered with baled hay, and no watch being kept on said ship while in port and while her cargo was being unloaded, and where there was no evidence of any "design or neglect" upon the part of the owners of said vessel by reason of which said fire might have been caused: *Held*, that under the provisions of Section 4282 R. S. U. S. continued in force by the Act of Congress of February 13, 1893, commonly called the "Harter Act", the owners of said vessel cannot be held to answer for the loss or damage to libellant arising from said fire, decided to be the proximate cause of the injury to his merchandise.—*McInerney v. Bark "C. D. Bryant"*, 124.
3. The words "management of the vessel" in Section 3 of the "Harter Act" cannot refer to the navigation of the ship while at sea, because there is an especial clause as to that. It applies rather to a "fault or error" resulting from the management of the business of the ship or the discipline thereof, as in this case, the failure to have a watch while in port, which concerned both the safety of the ship and its cargo, or the failure to do some thing which does not belong to the navigation or movement of the ship, but which affects in some degree both the ship and the cargo.—*McInerney v. Bark "C. D. Bryant"*, 124.

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4. The keeping of a watch is a part of "the management of the vessel" for the mistakes in which the owner and the vessel are both exempt under the provisions of Section 3 of the "Harter Act" so called.—*McInerney v. Bark "C. D. Bryant"*, 124.
5. In a proceeding *in rem* against a vessel, a decision in favor of the libellants and against the vessel and decreeing its sale for the payment of the amount of the judgment found due, would be simply a decree against the owner of the vessel; for, if the vessel is sold, it is the property of the owner which is sold and he would in that case be punished for something of which the statute (Section 3 "Harter Act") says he shall be exempt.—*McInerney v. Bark "C. D. Bryant"*, 124.

See SALVAGE,

SEAMAN.

SIGNALS.

See ADMIRALTY, I, 4, 15.

SIMILITUDE.

See CUSTOMS DUTIES, I, 4.

SLAVERY.

1. No form of slavery or involuntary servitude, except as a punishment for crime, can under Article Thirteen of the Amendments to the Constitution of the United States, be lawfully permitted to exist in the Territory of Hawaii.—*In the matter of Lee Chee Hing, etc.*, 434.
2. A Chinese woman shown to have been purchased of her mother in China for \$200, and afterwards brought to Hawaii and compelled by respondent to lead the life of a prostitute, turning all the earnings of such vocation over to him, and who was (while not physically restrained by respondent, in such fear of him by reason of threats against her life should she go out freely,) unable to leave the house where he detained her, found by the court to be restrained of her liberty and held in a condition of slavery repugnant to the Thirteenth Article of the Amendments to the Constitution of the United States, and released on *habeas corpus*.—*Ib.*

See CHINESE, 5.

CONSTITUTIONAL LAW, 14.

SPECIAL TAX.

See INTERNAL REVENUE, I, 4.

SUMMARY PROCESS.

See BANKRUPTCY, 12.

TARIFF ACT.

See CUSTOMS DUTIES, I, 6.

TAXATION.

See CONSTITUTIONAL LAW, 7, 8.

INTERNAL REVENUE, I, 4.

HAWAII, 4.

TERRITORIES, I.

TERRITORIES.

1. A territorial legislature has the power to levy taxes for all legal purposes and upon property subject to taxation within its jurisdiction.—*Achi v. Kapiolani Estate*, 86.
2. The organic act passed by Congress for the government of a territory and under which the territorial government is organized, must be taken as the fundamental law of the territory; and all territorial legislative assemblies derive their force and validity from such organic acts.—*Achi v. Kapiolani Estate*, 86.
3. A territorial legislature has all the powers of a state legislature, except as limited by the Organic Act of the Territory, the Constitution of the United States, and the Acts of Congress, and these powers include the power to tax for local purposes, which is inherent in all governments.—*Peacock et als. v. Wright et al.*, 294.

See HAWAII, 5.

TERRITORIAL COURTS.

1. The decision of the Supreme Court of the Territory of Hawaii construing the charters granted by the Legislature of Hawaii to two certain street railway corporations and deciding their respective rights thereunder to lay tracks in certain of the streets of the city of Honolulu, Territory of Hawaii, *Held*, to be binding upon the U. S. District

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Court upon an application for an injunction by one of said corporations to restrain the other from laying tracks in said streets of Honolulu, and said Court to be without jurisdiction in the absence of any showing that a Federal question was involved. The injunction denied.—*Haw. Tram. Co. v. R. T. & L. Co.*, 164.

See CONSTITUTIONAL LAW, I3.

JURISDICTION, I.

TREATIES.

- I. Under the provisions of Section II of the Treaty of 1887 between the Government of Hawaii, then represented by King Kalakaua, and the Republic of the United States, the United States acquired the exclusive right to the land-locked waters of Pearl Harbor and now owns and of right controls all of the waters thereof.—*U. S. v. Estate of Bishop et al.*, 223.

UNITED STATES.

- I. The port of Honolulu is a port of the United States and the importation of women therein for purposes of prostitution is an importation "into the United States."—*U. S. v. Miyama*, 399.

See TREATIES, I.

UNITED STATES COURTS.

- I. A citizen of a state cannot sue a citizen of a territory in the Courts of the United States where diverse citizenship is the only ground of jurisdiction relied upon.—*Avery v. King*, 12.
2. Sections 914 and 918 of the Revised Statutes of the United States should be considered together. A discretion is left with both the Circuit and District Courts of the United States to so arrange their practice, pleadings and forms and modes of proceedings as "may be necessary for the advancement of justice and the prevention of delays in proceedings."—*U. S. v. Estate of Bishop et al.*, 140.
3. Where the legislature of the Territory of Hawaii is acting within the general powers conferred upon it by Congress in the enactment of an income tax law, the United States District Court will not entertain a bill to enjoin the collection of said tax.—*Peacock et als. v. Wright et al.*, 294.
4. The United States District Court for the Territory of Hawaii is a court of federal jurisdiction only, made such by Section 86 of the

Act of Congress of April 30, entitled "An Act to provide a government for the Territory of Hawaii" (Vol. 31, U. S. Stat. p. 141).—*Spreckels Bros. Co. v. "Nevadan"*, 354.

5. The provisions of Section 914 R. S. U. S. are not mandatory upon the United States District Court; on the contrary a discretion is left in the court as to whether it will follow technically the forms, pleadings and modes of procedure of the courts of the territory.—*Berger v. Bishop*, 405.
6. In an action at law based upon the provisions of Sections 4 and 5 of the Act of March 3, 1903, entitled "An Act to regulate the immigration of aliens into the United States", where defendant pleaded as a bar to the action, the decision of a board of special inquiry provided for by Section 25 of said Act, admitting the alien claimed to have been brought into the country in violation of Sections 4 and 5 thereof, *Held*, that Congress had provided a tribunal for the recovery of the penalty sued for in "the courts of the United States," and further provided that "both the Circuit and District Courts should be invested with full and concurrent jurisdiction of all causes, civil and criminal arising under any of the provisions of the Act." No restraint was placed upon the judgment of the courts by reason of the previous action of the administrative branch of the government. The question at issue between the alien and the government in that special inquiry, was simply one of the alien's right to land.—*Berger v. Bishop*, 405.

See ADMIRALTY, 13.

ALIENS, 4.

BANKRUPTCY, 7, 12,

FOREIGN CORPORATIONS, 1.

HABEAS CORPUS, 3, 4, 5.

JURISDICTION, 1, 5.

USER.

See EMINENT DOMAIN, 24.

VERDICT.

See NEW TRIAL, 1, 2, 3.

WAGES.

See ADMIRALTY, 19.

SEAMEN, 3, 9.

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WARNINGS.

1. Where in the process of transferring sugar from the hold of one ship into the hold of another ship, with the usual and customary appliances, a sling containing some 1250 pounds of sugar was lowered unexpectedly by an employe of defendant on to the deck of a ship into whose hold the sugar was being loaded, severely injuring the mate of said ship, who made ineffectual attempts to get out of the way of the descending sugar, and some evidence was introduced as to the giving of warnings, of the coming of the sugar, by the officers of the defendant. *Held*, that these warnings were not shown to have been brought home to the injured person.—*Lorenzen v. I. I. S. Nav. Co.*, 267.
2. Even if warnings are shown to have been heard by the injured person claiming damages for such injury, and said warnings disregarded, thus showing a degree of negligence on his part, that would not relieve the defendant from the results of its negligence, if by the exercise of reasonable care, it could have avoided the consequences of the negligence of the injured person.—*Ib.*

See ADMIRALTY, 14.

WATCH.

See SHIPPING, 2, 3, 4.

WITNESSES.

1. Number of witnesses.—*United States v. Ohta*, 158.
2. Asiatic witnesses.—*United States v. Ohta*, 158.
3. The government is not bound in a criminal case by the testimony of a witness produced in its behalf, where such testimony is contrary to statements made by such witness out of court to the prosecuting officers of the government, and which statements resulted in the bringing of charges against the defendant.—*U. S. v. Miyama*, 399.

WORDS.

See ASSAULT, 1, 2.


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